(8)

FILED
SEP 16 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 403

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

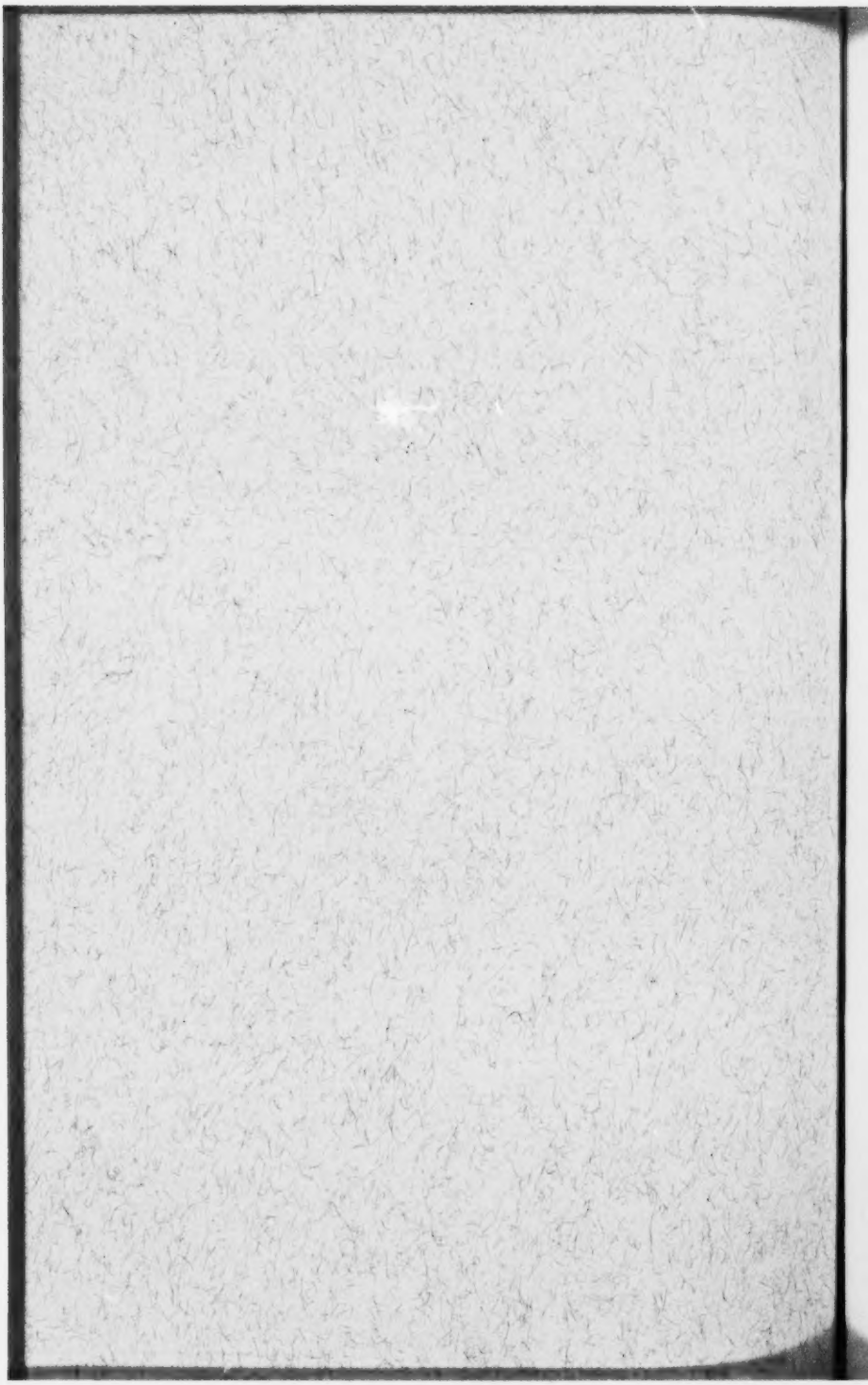
vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE AND BRIEF IN SUPPORT THEREOF.

JAMES R. MORFORD,
Counsel for Petitioner.

MARVEL AND MORFORD,
Of Counsel.



INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
I. Summary statement of the matter involved	1
II. Statement of Supreme Court's jurisdiction to review decree of the Supreme Court of Delaware	3
III. The federal decree relied upon by respondent and the issues, parties and proceedings with respect thereto	7
IV. The extent of involvement of the notes in suit in the foreclosure cause	10
V. The questions presented	13
VI. Reasons relied on for the allowance of writ of certiorari Prayer for writ	15
Brief in support of petition	17
Opinions below	17
Jurisdiction	18
Specifications of error	18
Statement of the case (see summary statement of matter involved)	24
Argument	24
A. The lack of federal jurisdiction to support the decree of December 1, 1936 as an adjudication against petitioner	24
B. The status of petitioner as a "represented" party to the foreclosure cause	35
C. Essential limitations in determining the scope of an adjudication and the application of the doctrine of res adjudicata	45
D. The notes in suit below as "consideration" for bonds involved in the foreclosure cause	50
E. The effect of denial of certiorari by the Supreme Court of the United States	52
Conclusion	53

Page

Table of Cases Cited.

Argenbright v. *Phoenix Finance Co.*, 187 A. 124..... 9
Avery v. *Popper*, 179 U. S. 305, 21 Sup. Ct. 94, 45 L. Ed. 203..... 4
Baltimore Steamship Co. v. *Phillips*, 274 U. S. 316, 71 L. Ed. 1069..... 46
Bates v. *Bodie*, 245 U. S. 520..... 46
Bride v. *Stormer*, 291 Ill. App. 502, 10 N. E. (2d) 208.. 42
Browne v. *Strode*, 5 Cranch 303, 3 L. Ed. 108..... 31
Carneal v. *Banks*, 23 U. S. 181..... 31
Central Appalachian Co. v. *Buchanan*, 90 Fed. 454.... 48
Central Trust Co. v. *California & N. R. Co.*, 110 Fed. 70. 41
Clemons v. *Elder*, 9 Iowa 272..... 33
Cromwell v. *County of Sac*, 94 U. S. 351..... 46
Cumberland Glass Mfg. Co. v. *DeWitt*, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042..... 4
Cunningham v. *Macon & B. R. R. Co.*, 109 U. S. 446.. 32
Dawson v. *Columbia Ave. Sav. Fund, S. O. Title & T. Co.*, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713..... 26
Dickerman v. *Northern Trust Co.*, 176 U. S. 181; 44 L. Ed. 423..... 9, 43
Doyle v. *Hamilton Fish Corp.*, 234 Fed. 47..... 49
D. L. Flack & Son, Inc. v. *West Virginia Coal Co.*, 46 F. (2d) 177..... 49
Drifter, The, 35 F. (2d) 1006..... 49
Duchess of Kingston's Case, 1 Leach 146, 168 Eng. Repr. 175, 2 Smith's Lead. Cas. (12th ed.) 754..... 46
Ebeling, In re, 123 F. (2d) 520..... 38
Elwell v. *Fosdick*, 134 U. S. 500..... 44
Embry v. *Palmer*, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346..... 4
Erie R. R. v. *Tompkins*, 304 U. S. 64..... 33
Factors & T. Ins. Co. v. *Murphy*, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582..... 4
Federal Land Bank of Omaha v. *Jefferson*, 295 N. W. 855. 46
First National Bank v. *Shedd*, 121 U. S. 74..... 9
Fonda J. & G. R. Co. v. *New York Trust Co.*, 233 App. Div. 443, 254 N. Y. S. 266..... 42
Freeman v. *Marsh*, 3 N. J. L. 65..... 48

Page

Georgetown v. *Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012 40
Graeser v. *Phoenix Finance Co. of Des Moines*, 254 N. W. 859 9
Guaranty Trust etc. Co. v. *Green Cove etc. R. R.*, 139 U. S. 137 9
Halle v. *Van Sweringen Corp.*, 37 Del. 491, 185 A. 236. 36
Hancock Nat. Bank v. *Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619 4
Hansberry v. *Lee*, 311 U. S. 32, 61 Sup. Ct. 115, 85 L. Ed. 22 5
Harrisburg & Eastern R. Co.'s Appeal, 15 A. 459, 1 L. R. A. 230 42
Hildebrand v. *American Fine Art Co.*, 109 Wis. 171, 85 N. W. 268 48
Horn v. *Lockhart*, 17 Wall. 570, 21 L. Ed. 657 36
Hovey v. *Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215 54
Hurtado v. *California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232 54
Iowa Title & Loan Co. v. *Clark Bros.*, 213 Iowa 875, 237 N. W. 336 ..... 33, 42
Iowa-Wisconsin Bridge Co. v. *Phoenix Finance Corp.*, 25 A. (2d) 383 3
Indianapolis v. *Chase National Bank*, 62 Sup. Ct. 15, 86 L. Ed. 27, (Nos. 10–13 October Term, 1941) 25
Ingram v. *Jones*, 47 F. (2d) 135 42
Japha v. *Delaware Valley Utilities Co.*, 40 Del. 599, 15 A. (2d) 432 36
Jennings v. *Webster*, 8 Paige (N. Y.) 503, 35 Am. Dec. 722 47
J. J. Hockenjos Co. v. *Lurie*, 173 A. 913 49
Kerrison v. *Stewart*, 3 Otto. 155, 93 U. S. 155, 23 L. Ed. 843 41
Knights of Pythias v. *Meyer*, 265 U. S. 30, 44 Sup. Ct. 432, 68 L. Ed. 885 4
Lattomus v. *Garman*, 3 Del. Ch. 232 48
Mackay v. *Randolph Macon Coal Co.*, 178 Fed. 881 38
Manning v. *Norfolk S. R. Co.*, 29 Fed. 838 36

Page

McGowan v. *American Pressed Tan Bark Co.*, 121 U. S. 575 48
McNutt v. *Bland*, 2 How. 9, 11 L. Ed. 159 31
Mercantile Trust Co. v. *Schlafly*, 299 Fed. 202 44
Merced Secur. Sav. Bank v. *Casaccia*, 103 Cal. 641, 37 P. 648 51
Miller v. *Mahaffy*, 45 Iowa 289 33
Minnesota v. *Northern Securities Co.*, 184 U. S. 199 34
Moran v. *Hagerman*, 64 Fed. 499 41
Mullaney v. *Mullaney*, 65 N. J. Eq. 384, 54 A. 1086 ... 49
Murray v. *Hoboken Land etc. Co.*, 18 How. 272, 15 L. Ed. 372 54
National Salt Co. v. *Ingraham*, 143 Fed. 805 39
Niles-Bement-Pond Co. v. *Iron Moulders*, 65 L. Ed. 254, 41 Sup. Ct. 39, 65 L. Ed. 145 36
Northern Indiana R. Co. v. *Michigan Central R. Co.*, 15 How. 233 34
Old Wayne Mut. Life Asso. v. *McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345 5
Payne v. *Hook*, 7 Wall. 425, 19 L. Ed. 260 35
Phoenix Finance Corp. v. *Iowa-Wisconsin Bridge Co.*, 14 A. (2d) 386, 40 Del. 500 ..... 2, 40
Pittsburgh C. C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 19 Sup. Ct. 238, 43 L. Ed. 528 4
Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464 46
Postal Teleg. Cable Co. v. *Newport*, 247 U. S. 464, 38 Sup. Ct. 566, 62 L. Ed. 1215 5
Ribon v. *R. R. Companies*, 16 Wall. 446 34
Richter v. *Jerome*, 123 U. S. 223 44
Riley v. *New York Trust Co.*, 62 Sup. Ct. 608, 86 L. Ed. 551 (No. 81 October Term 1941) 5
Ruhlin v. *New York Life Insurance Co.*, 304 U. S. 202 .. 33
Shields v. *Barrow* 31
Smith v. *Billings*, 62 Ill. App. 77 47
Societe Vinicole De Champagne v. *Mumm Champagne & Importation Co., Inc.*, 10 F. Supp. 289 50
Southern Pacific R. Co. v. *United States*, 168 U. S. 1, 42 L. Ed. 355 46
Stanley v. *Turner*, 68 Vt. 315, 35 A. 321 48

Page

State v. *Board of Commissioners*, 22 N. W. 562, 166 P. 906 48
Supreme Tribe of Ben-Hur v. *Cauble*, 255 U. S. 356 31
Susquehanna & W. V. R. & C. Co. v. *Blatchford*, 11 Wall. 172, 20 L. Ed. 179 31
Swan Land and Cattle Co. v. *Frank*, 148 U. S. 603 32
Texas & Pacific Ry. Co. v. *Johnson*, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81 4
Thomas v. *Brownville R. Co.*, 109 U. S. 522 44
Toucey v. *New York Life Ins. Co.*, 102 F. (2d) 16 42
Union Bank of Louisiana v. *Stafford*, 12 How. 327, 13 L. Ed. 1008 35
United States v. *Carver*, 260 U. S. 482, 67 L. Ed. 361 .. 52, 53
United States v. *Davis*, 3 F. Supp. 97 50
United States v. *Hoyt*, *Fed. Cas.* 15409. 1 Blatch. 326 .. 51
United States v. *Mitchell*, 205 U. S. 161 48
Walden v. *Skinner*, 101 U. S. 577, 25 L. Ed. 963 31
Weiland v. *Pioneer Irr. Co.*, 238 Fed. 519, 259 U. S. 498. 30
Wilson v. *Alliance Life Ins. Co.*, 108 F. (2d) 150 42
Wingate v. *Parsons*, 4 Del. Ch. 117 48
Wormley v. *Wormley*, 21 U. S. 421, 5 L. Ed. 651 ..... 31, 35

STATUTES CITED.

Act of March 3, 1911, 36 Stat. 1091, 28 U. S. C. A. 41(1) . 18
Constitution of the United States, Article III, Sec. 2 .. 18
Constitution of the United States, 5th Amendment 5
Constitution of the United States, 14th Amendment ... 5
Constitution of Delaware, Article IV, Section 12 6
Judicial Code, Sec. 237(b); 28 U. S. C. A. 344(b) 3, 4, 18
Iowa Statutes, Sec. 10968, Code 1935 32

TEXT BOOKS CITED.

Bower on Res Adjudicata, Sec. 173 50
1 & 2 Freeman on Judgments (5th Ed.) Sec. 627, p. 1322; Sec. 337, p. 674; Sec. 355, p. 738 46
2 Freeman on Judgments (5th Ed.) Sec. 584 51
6 Fletcher, Cyc. Corp. Sec. 2751, p. 616 36
Robertson & Kirkham's "Jurisdiction of the Supreme Court of the United States," Sec. 287, pp. 544, 545 .. 53
Short on Railroad Bonds and Mortgages, Secs. 274, 497. 42

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 403

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Phoenix Finance Corporation respectfully represents:

I.

Summary Statement of the Matter Involved.

Petitioner sued respondent in assumpsit in Superior Court of the State of Delaware, for New Castle County, on promissory notes given by respondent to petitioner, the present holder, as follows: (a) note for $3125 dated January 20, 1933, due July 20, 1933 (R. 93), and (b) note for

$2000 dated December 15, 1932, due June 15, 1933 (R. 92). Both notes bore interest at 8%.

Case tried before two Judges of Supreme Court of Delaware sitting as Judges of Superior Court. Jury waived. Sole issue one of law arising from defendant's plea of *res adjudicata.* In support of its plea, defendant offered in evidence record of a certain cause originating in United States District Court for Northern District of Iowa (hereinafter referred to as "Foreclosure Cause") and decree therein dated December 1, 1936.[1]

Judgment based upon written opinion of trial judges, rendered in favor of plaintiff (petitioner herein) for $8,026.60 and costs. Opinion of trial court was to the effect that the decree in the Foreclosure Cause in the Federal Court did not, for the reasons therein stated, have the qualities of an adjudication *in personam* against the plaintiff and did not therefore sustain the plea of *res adjudicata.*

Phoenix Finance Corporation v. *Iowa-Wisconsin Bridge Company,* 14 A. (2d) 386, 40 Del. 500.

On writ of error to the Supreme Court of Delaware, judgment reversed (Decree: R. 144-145; Opinion; R. 131-144) and entry of judgment for defendant (the respondent herein) directed. The Supreme Court after pointing out that a decree or judgment of a Federal Court is entitled to the same sanctity and effect as a decree or judgment of a State court[2] held that the decree of December 1, 1936,

---

[1] Foreclosure Record p. 202-204. The printed record of said cause in the Circuit Court of Appeals for the 8th Circuit, the same being No. 11,055, was offered as defendant's Exh. No. 4 (R. 52) and was before the Superior and Supreme Courts of Delaware. See stipulation (R. 3) for filing of copies of this record in Supreme Court of Delaware in lieu of reprinting thereof. This exhibit has been certified as a part of the record herein and in lieu of the reprinting thereof, ten printed copies have been filed for the use of this Court. For convenience and differentiation this exhibit will be herein referred to as the Foreclosure Record or "F.R.".

[2] This is conceded.

in the Foreclosure Cause "was entitled to full faith and credit, and it constituted a complete defense to the action on the notes under the plea of res adjudicata." (R. 144).

Iowa-Wisconsin Bridge Company v. *Phoenix Finance Corporation,* 25 A. (2d) 383, 391.

Whereupon Phoenix Finance Corporation, the plaintiff in the Superior Court and the defendant-in-error in the Supreme Court of Delaware, petitions herein for certiorari. The jurisdictional grounds are next hereinafter stated. The pleadings, parties, issues and decree of the Federal court in the earlier Foreclosure Cause are fully disclosed and discussed under an appropriate heading of this petition.

II.

Statement of Supreme Court's Jurisdiction to Review Decree of the Supreme Court of Delaware.

Section 237 (b) of the Federal Judicial Code as amended (28 U. S. C. A. Sec. 344 (b)) provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; *and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.* * * *." (Italics supplied.)

Although judicial proceedings of a Federal Court are not within the express coverage of the full faith and credit

clause, they "must be accorded the same full faith and credit by State courts as would be required in respect of the judicial proceedings of another State."

Knights of Pythias v. *Meyer,* 265 U. S. 30, 33; 44 S. Ct. 432; 68 L. Ed. 885;

Hancock Nat. Bank v. *Farnum,* 176 U. S. 640, 644; 20 Sup. Ct. 506; 44 L. Ed. 619;

Embry v. *Palmer,* 107 U. S. 3, 9; 2 Sup. Ct. 25; 27 L. Ed. 346.

Where in a State court, a right or immunity is set up under and by virtue of a judgment or decree of a Federal court the case is "one in which a title or right is claimed under an authority exercised under the United States" within the meaning of Section 237 (b) of the Judicial Code.

Knights of Pythias v. *Meyer, supra;*

Cumberland Glass Mfg. Co. v. *DeWitt,* 237 U. S. 447, 449; 35 S. Ct. 636; 59 L. Ed. 1042;

Pittsburgh C. C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.,* 172 U. S. 493, 507; 19 S. Ct. 238; 43 L. Ed. 528;

Texas & Pacific Ry. Co. v. *Johnson,* 151 U. S. 81, 98-99; 14 S. Ct. 250; 38 L. Ed. 81;

Factors & T. Ins. Co. v. *Murphy,* 111 U. S. 738, 741; 4 S. Ct. 679; 28 L. Ed. 582.

It was held in *Avery* v. *Popper,* 179 U. S. 305, 314, 21 S. Ct. 94, 45 L. Ed. 203 that "the writ will lie, if the validity or construction of the judgment of the Federal Court, or the regularity of the proceedings * * * are assailed * * *." This was the precise situation in the Delaware Courts. The defendant (respondent here) contended that the decree of December 1, 1936 in the Foreclosure Cause was a valid adjudication with respect to the plaintiff's

(petitioner's) right to maintain an action on the promissory notes in question. The plaintiff contended that said federal decree did not constitute a valid adjudication against it within the issues of the Delaware case and should not be so construed. Within the language of Sec. 237 (b) the *respondent* therefore claimed and set up a "title, right, privilege or immunity" under the authority exercised by the United States.

Moreover, this court has jurisdiction of the question here presented because of a "right, privilege or immunity" claimed by *petitioner* "under the Constitution", *viz.*, the due process clauses of the 5th and 14th Amendments. Where a judgment or decree lacks the qualities to entitle it to full faith and credit "judicial action enforcing it * * * is not that due process which the Fifth and Fourteenth Amendments require."

Hansberry v. *Lee,* 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22.

Postal Teleg. Cable Co. v. *Newport,* 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215.

Old Wayne Mut. Life Asso. v. *McDonough,* 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

As stated by this Court in *Riley* v. *New York Trust Co.,* 62 S. Ct. 608, 86 L. Ed. 551, 558, Adv. Op. No. 81, October Term, 1941, if the effect of a decree "was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process".

The instant case falls within the foregoing principle. The Delaware Superior Court held that the doctrine of representation did not apply so as to bind the plaintiff by the decree of December 1, 1936 in the federal Foreclosure Cause. The Supreme Court on the other hand held that the plaintiff below was bound by such decree by virtue of the

doctrine of representation and that the plea of *res adjudicata* set forth a valid defense. By this petition Phoenix Finance Corporation contends that the decree of the Supreme Court of Delaware deprived it of its property and property rights with respect to the notes in suit by virtue of the sustaining of a defense to the action thereon, based upon an adjudication in a former proceeding to which it was not an indispensable party, in which it was not represented with respect to the issues of the Delaware suit, in which the issues of the Delaware suit were neither involved by pleading or otherwise litigated, in which the decree, responsive to the pleaded issues, was a mere denial of the right of Trustees representing bondholders to foreclose a mortgage, and in which any adjudication against petitioner in respect of the notes in suit was a matter without the constitutional and statutory jurisdiction of a federal court.

It is contended that the decision of the Supreme Court of Delaware sustaining the plea and giving purported faith and credit to the federal decree is a denial of due process under the Fourteenth Amendment. On the other hand, the construction by this or any other Federal Court of the decree of December 1, 1936 in the Foreclosure Cause as constituting an adjudication of petitioner's right to maintain suit on the promissory notes in question would be, it is respectfully submitted, a denial of due process under the Fifth Amendment.

By virtue of Article IV, Section 12 of the Constitution of the State of Delaware, the Supreme Court of Delaware is the "highest court" of that state.[3]

---

[3] "Section 12. The Supreme Court shall have jurisdiction as follows: (1) To issue writs of error to the Superior Court and to determine finally all matters in error in the judgments and proceedings of said Superior Court."

III.

The Federal Decree Relied Upon By Respondent and the Issues, Parties and Proceedings With Respect Thereto.

This was an original proceeding in the United States District Court for the Northern District of Iowa for the foreclosure of a mortgage deed of trust. Original parties: First Trust & Savings Bank *(an Iowa corporation)* and Schubert (*a citizen of Wisconsin*), Trustees, complainants; Iowa-Wisconsin Bridge Company (herein sometimes referred to as "Bridge Company"), *a Delaware corporation*, defendant (F. R. 1-2).

The Bridge Company filed its answer to the bill for foreclosure (F. R. 62-66) denying *inter alia* "that said mortgage deed of trust is a valid and binding lien upon the property as alleged in the complainants' bill". By an amended answer (F. R. 67-68) the Bridge Company prayed for cancellation of "any and all bonds improperly delivered."

One Kendrick filed petition for intervention (F. R. 73-83) in form of cross-bill praying *inter alia* for the cancellation of the deed of trust and bonds (F. R. 82-83).[4] Kendrick then moved (F. R. 83) that *Phoenix Finance System, Inc.*, a Delaware corporation (hereinafter sometimes referred to as "System") together with other corporations "be made parties *defendant* herein" (F. R. 84). Phoenix Finance Corporation, this petitioner and also a Delaware corporation (hereinafter sometimes referred to as "Phoenix") not so named. The named corporations were alleged by the

[4] Master and court gave same effect to intervention petitioner as though it were cross-bill in the right of Bridge Company against Phoenix for cancellation of mortgage and bonds. Intervener Kendrick in certain resistances in Foreclosure Cause refers to petition as a "Cross-Bill" and Phoenix' answer thereto as an "answer to Cross-Bill" (F. R. 207, 393).

motion to be "necessary and proper parties to this cause" (F. R. 84). After hearing leave to intervene was granted (F. R. 86). However the court treated the motion with respect to parties as a motion "to make additional parties *plaintiff* and *defendant to the petition of intervention* (F. R. 86) and in connection therewith, but without pleading or proof, the court by its order made the following statement (F. R. 86):

> "* * * and complaints counsel having stated in open court that the Phoenix Finance Corporation has succeeded the Phoenix Finance System, Inc. and is the holder of the bonds involved in the action with the exception of about $10,000 worth of said bonds."

The court thereupon ordered (F. R. 86):

> "* * * that the Phoenix Finance System, Inc. and the Phoenix Finance Corporation *be made parties plaintiff in this cause and defendants to the petition of intervention* * * *" (emphasis supplied).

System did not appear or answer and service of process as to it was quashed (F. R. 109-110).

Phoenix, as holder of more than 25% of the bonds secured by the deed of trust had requested the Trustees to foreclose, had agreed to indemnify the Trustees for expenses incurred, and had suggested counsel (F. R. 789-791; 794-795). Although there were no pleadings in the cause or prayers for relief directed against it, Phoenix appeared and answered the intervention petition (F. R. 91-92) by pleading ignorance of certain alleged acts of fraud on the part of System, charged as occurring in 1930 and early 1931. Phoenix was not incorporated until December 29, 1931 (F. R. 542). No allegations or subsequent evidence as to identity or succession of interest as between Phoenix and Sys-

tem, appears in Foreclosure Record,[5] except testimony (F. R. 541) defining status as assignee and assignor, respectively, of certain property (not the notes in suit here). *No evidence of fraud on part of Phoenix or on part of System chargeable to Phoenix.*

Issues in Foreclosure Cause referred to a Master (F. R. 107-108). Phoenix *pro se* did not participate in trial before Master nor offer evidence.[6] District Court held trustee complainants had "exclusive control" of the litigation and that Phoenix "was merely a formal and not an indispensable party" (F. R. 211).

The Master held deed of trust and bonds partially valid and partially invalid, and recommended foreclosure (F. R.

[5] There was no merger, consolidation, corporate identity or succession. So decided in *Argenbright et al.* v. *Phoenix Finance Co. of Iowa*, 187 A. 124, 126 (Del. Ch.) and *Graeser* v. *Phoenix Finance Co. of Des Moines*, 254 N. W. 859 (Iowa).

[6] Possible that Phoenix was the victim of procedural error. Tacit understanding of all parties, acquiesced in by Master that evidence would be heard in two distinct stages: (1) issue of validity of deed of trust, and if and when foreclosure decreed, (2) issue as to bonds entitled to participate in proceeds. (F. R. 225, 226, 228-230, 363, 451, 561, 637, 693.) This was in accord with recognized federal procedure (*Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 194; *Guaranty Trust etc. Co.* v. *Green Cove etc. R. R.*, 139 U. S. 137, 150; *First National Bank* v. *Shedd*, 121 U. S. 74). Phoenix' witnesses released to return at anticipated second stage (see F. R. 259, 282, 363, 368 and affidavits of counsel, F. R. 224-225; 226-228; 228-230). In certain "Suggestions" filed in this court on petition for writ in Foreclosure Cause (No. 438 October Term, 1938) counsel for Trustee Complainants stated: "*The Trustees presented the case in the District Court on the theory, believed to have been accepted by the Master in Chancery, that only one issue was then up for consideration, namely, the right to a foreclosure of the Mortgage Deed of Trust, and assumed that the question of the validity of the bonds would not be taken up until after a foreclosure was ordered (R. 224-230). That is to say, the trustees never pretended to represent bondholders for any other purpose except that relating to the security under the mortgage. At no time did Counsel for the trustees attempt to prove the validity or disprove the invalidity of any individual bond, as such. With the controversy between the mortgagor and the bondholders relating to the validity of individual bonds, the trustees felt they had nothing to do.* * * *." Case never went beyond first procedural stage and Phoenix' evidence was never heard or presented.

138) to the extent held valid. District Court, partially affirming and partially reversing Master, decreed December 1, 1936 (F. R. 202-204):

> "And the Court now being fully advised in the premises, it is Ordered, Adjudged, and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000 hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000 in bonds. *That foreclosure and sale of the mortgaged property be denied* * * *" (italics supplied.)

Phoenix petitioned for rehearing (F. R. 216-223) with supporting affidavits (F. R. 224-391). Denied (F. R. 411). On appeal to Circuit Court of Appeals for the Eighth Circuit, decree below affirmed (Opinion, F. R. 1689-1709, 98 F. (2d) 416; Decree, F. R. 1709). Petition for writ of certiorari to Supreme Court of the United States denied (305 U. S. 650, 676; No. 438 October Term, 1938).

IV.

The Extent of Involvement of the Notes in Suit in the Foreclosure Cause.

The notes in suit for $3125 and $2000 respectively were given to petitioner under the following circumstances:

Meeting of the Board of Directors of Bridge Company held July 7, 1933 at which following resolutions adopted (F. R. 1028-1029):

"5. Vice President English and Secretary Thorson reported that since the December 5, 1932 meeting of the Board they had succeeded in borrowing funds from the Phoenix Finance Corporation for the purpose of taking care of the interest on the corporation's bonds in the approximate amount of $9,821.00 and for the payment of taxes in the amount of $3125.51[7] and for the payment of other pressing bills amounting to several thousand dollars. An itemized statement of all funds advanced by the Phoenix Finance Corporation was presented to the Board members and approved by them. The statement showed moneys advanced by the Phoenix Finance Corporation as follows:

On open account to June 30, 1933 and unpaid $12,110.19
On notes to June 30, 1933 and unpaid..... 5,625.00

6. Upon motion by Mr. Wagner, seconded by Mr. Wilder the following resolution was unanimously adopted:

Resolved, that the vice president and secretary of the corporation be and hereby are instructed to execute the demand note of this corporation in the amount of $12,110.19 with interest at 8% per annum in favor of the Phoenix Finance Corporation in payment of funds advanced by said corporation on open account, and

Be it Further Resolved, that the treasurer of this corporation be and hereby is instructed to pledge $20,-100.00 of the Class B bonds of this corporation as collateral to said note and also to the other notes owing to the Phoenix Finance Corporation by this corporation."[8]

The $5625 item above mentioned included the two notes in suit for $3125 and $2000 respectively and another note,

---

[7] The actual consideration for the $3125 note in suit.

[8] Validity of or *consideration* for notes in suit not questioned below. Although defendant pleaded *Non Assumpsit, Statute of Limitations, Payment, Accord and Satisfaction; Set-off* and *Release,* (R. 13) these defenses abandoned and case tried on single issue raised by plea of *res adjudicata.* (R. 28-29, 74.)

not here involved, for $500. The $20,100 Class B bonds of Bridge Company were a part of the authorized issue of $200,000 secured by the Deed of Trust sought to be foreclosed.

The notes in suit represented obligations *originating with Phoenix.* They did not pass through System and were not involved directly or indirectly in any proceeding to which System was a party. The Deed of Trust securing the $200,000 bond issue was authorized at a stockholders' meeting of Bridge Company held December 22, 1931 (F. R. 946, 952, 953). Indenture actually executed on February 20, 1932 although dated as of January 1, 1932 (F. R. 3). The bonds were dated January 1, 1932 (Exhibit 2 (H. E. B.) F. R. 775), but the collateral bonds in the amount of $20,100 authorized at the meeting of July 7, 1933 were not issued and delivered to Phoenix until the latter date.

There was no finding of fact either of the Master or the trial court referrable directly or indirectly to the $2000 note in suit. With respect to the $3125 note the Master found valid consideration (Findings 10 (i), 10 (k), F. R. 133-134).

The Master recommended foreclosure as to $27,125 of bonds, including bonds of face value to secure the $3125 item (F. R. 138). The District Court disapproved Master's findings 10 (i) and 10 (k) (F. R. 179). *The Court, while not denying that said $3,125 note was in itself a valid and subsisting obligation of the Bridge Company to Phoenix, in effect held and found that there was an unliquidated set-off or counterclaim*[9] *of the Bridge Company against Phoenix in the sum of $14,000 which rendered this note unenforceable* (F. R. 177-178; 192-193).

No *decree* or *judgment* with respect to the foregoing was entered in the cause. No defense of set-off or counter-

[9] This set-off or counterclaim bore no relation to the mortgage debt.

claim was pleaded in any form or asserted by way of defense at the trial. No issue was presented in pleadings concerning notes in suit below. No relief was demanded with respect thereto by any prayer of any moving pleading. No judgment or decree has been entered denying or affirming the validity of enforceability thereof.

V.

The Questions Presented.

The questions presented by this petition are as follows:

1. Whether in the Foreclosure Cause petitioner had a proper status as a party against whom a valid adjudication could be made with respect to promissory notes in suit below and if so, whether federal jurisdiction existed to sustain such an adjudication. *Indianapolis* v. *Chase National Bank, infra*).

2. Whether the Delaware Supreme Court has so construed the decree of December 1, 1936 in the Foreclosure Cause (viz., by holding the same to have constituted an adjudication against petitioner as to the notes in suit in the Delaware Court) as to state a case of lack of federal jurisdiction and whether there was the necessary diversity of citizenship to support such federal jurisdiction. (*Indianapolis* v. *Chase National Bank, infra.*)

3. Whether or not the decree of Deecember 1, 1936 in the federal Foreclosure Cause constituted a valid adjudication *in personam* against petitioner with respect to the issues presented in the trial court below and whether or not the pleaded defense of *res adjudicata* should or should not have been sustained.

4. (a) Whether a trustee under a deed of trust securing a bond issue "represents" the bondholders (at least in the absence of express authority), so as to permit an adjudication, in a proceeding to foreclose the deed of trust, of contractual obligations and claims (including counter-claims and set-offs) between a bondholder and the defendant mortgagor.

(b) Whether express authority for such representation appears in the indenture or bonds.

5. Whether or not the "doctrine of representation" should be extended so as to justify the construction of a decree denying mortgage foreclosure, in an action *in rem* or *quasi in rem*, between the trustees of a deed of trust securing a bond issue and the mortgagor, as an adjudication *in personam* against a bondholder with respect to contractual obligations and claims between such bondholder and the mortgagor not directly related to the trust *res* or the common interest of bondholder and trustees therein.

6. Whether or not the courts of Delaware are required by law to give full faith and credit to the decree of December 1, 1936 in the federal Foreclosure Cause insofar as petitioner is concerned, particularly with respect to issues not pleaded or otherwise litigated in said Foreclosure Cause, where petitioner was merely a "formal" party to that cause.

7. Whether or not the Supreme Court of Delaware has so construed the proceedings and decree of December 1, 1936 in the Foreclosure Cause as to deprive petitioner of property without due process of law.

VI.

Reasons Relied on for the Allowance of Writ of Certiorari.

In the exercise by the Supreme Court of its judicial discretion to grant the writ herein prayed, it is submitted by petitioner that there are special and impelling reasons therefor, to wit:

1. The recent case of *Indianapolis* v. *Chase National Bank, infra,* calls for a consideration by this court of the essential limitations on federal jurisdiction in the Foreclosure Cause.

2. With respect to the issues presented in the court below, viz., its right to sue and recover upon the promissory notes in suit, the petitioner has never had its day in court.

3. The Supreme Court of Delaware has upheld as a valid former adjudication against petitioner with respect to the issues presented in the Delaware court, a decree of a federal court denying mortgage foreclosure, in a cause for the foreclosure of a mortgage deed of trust, where petitioner was not an indispensable party or represented with respect to the issues *sub judice,* and where the same issues were not raised or otherwise litigated or decided.

4. The construction given by the Supreme Court of Delaware (reversing a *contra* construction of the Superior Court) to the decree of December 1, 1936 in the federal Foreclosure Cause results in a deprivation of petitioner's property in and to the notes in suit, without due process of law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Delaware, commanding that court to certify and send to this Court for the review and determination on a day certain to be named therein, a true and complete copy of the record and proceedings in this cause in said court, the same being numbered on its docket No. 4 October Term, A. D. 1940 and being entitled "Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Defendant below, Plaintiff-in-Error, v. Phoenix Finance Corporation, a corporation of the State of Delaware, Plaintiff below, Defendant-in-Error", and that upon consideration thereof the decree of said Supreme Court of Delaware be reversed.

And your petitioner, as in duty bound, will ever pray.

PHOENIX FINANCE CORPORATION,
By JAMES R. MORFORD,
Its Attorney.

MARVEL & MORFORD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 403

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the Superior Court of Delaware is reported in 14 A (2d) 386; 40 Del. 500. The Supreme Court's opinion appears in 25 A (2d) 383.

Opinions in the federal Foreclosure Cause are as follows: District Court, 19 F. Supp. 127; affirmed Circuit Court of Appeals, 8th Circuit, 98 F. (2d) 416; Certiorari Denied U. S. Supreme Court, 305 U. S. 650, 676.

In a later proceeding supplemental and ancillary to the decree in the Foreclosure Cause an opinion of the District Court appears in 32 F. Supp. 277; opinion of affirmance in the Circuit Court of Appeals, 8th Circuit, 115 F. (2d) 1;

certiorari granted U. S. Supreme Court, 312 U. S. 670, 61 S. Ct. 550, 85 L. Ed. 1112; reversed on a point not here involved, 62 S. Ct. 139, 86 L. Ed. 107; Adv. Ops. Nos. 16 and 19 October Term, 1941.

Jurisdiction.

Writ is prayed herein pursuant to the authority of Section 237 (b) of the Judicial Code (28 U. S. C. A. Sec. 344 (b)). Involved therein is also a question of due process under the 5th and 14th Amendments. This subject is adequately discussed under heading II of the petition (pp. 3-6).

The reasons relied on for the exercise by the Court of its judicial discretion in the premises have been stated under heading VI of the petition (p. 15).

There is also involved herein an important jurisdictional question implicit in a determination of the scope and effect of the decree of December 1, 1936 in the federal Foreclosure Cause (Const. Art. III, Sec. 2; 36 Stat. 1091; 28 U. S. C. A. Sec. 41 (1); *Indianapolis* v. *Chase National Bank, infra*). The subject is dealt with under heading "A" of the Argument (pp. 24-35) and is covered by Specifications of Error 1-4.

Specifications of Error.

Broadly stated the Supreme Court of Delaware erred in directing entry of judgment for the defendant below and in holding that the defendant's plea of *res adjudicata* and the evidence in support thereof constituted a valid defense to the plaintiff's cause of action.

The foregoing general specification applies to all points under petitioner's argument. The specifications next fol-

lowing are grouped under the appropriate headings of the argument:

The Lack of Federal Jurisdiction to Support the Decree of December 1, 1936 as an Adjudication Against Petitioner.

(See Argument *infra* pp. 24-35.)

1. The Supreme Court of Delaware erred in holding (conformably to the District Court in the Foreclosure Cause) that petitioner "was merely a formal party to the proceeding, whose joinder did not destroy the diversity of citizenship upon which the jurisdiction depended." (R. 142; 25 A. (2d) p. 390).

2. Said court likewise erred in sustaining as a valid adjudication to sustain a plea of *res adjudicata,* a former decree of a federal court so construed as to constitute a direct adjudication between two Delaware corporations as opposed parties to an issue of liability or non-liability on the promissory notes of the one, held and owned by the other.

3. The Supreme Court of Delaware erred in disregarding the fact that by reason of the amended answer of Bridge Company and the intervention petition, an issue was defined, relating essentially to *cancellation of bonds,* with respect to which issue petitioner was an indispensable party to support a valid adjudication.

4. The Supreme Court of Delaware erred in omitting from its opinion a consideration of the Iowa decisional law as applied to the question of indispensable parties to support the decree of December 1, 1936 as an adjudication responsive to the issue of cancellation of mortgage and bonds and the effect of such Iowa decisional law on the

jurisdiction of the federal court to decree cancellation of mortgage and bonds in a "collision of interest" between two Delaware corporations.

The Status of Petitioner as a "Represented" Party to the Foreclosure Cause.

(See Argument *infra* pp. 35-45).

5. The Supreme Court of Delaware misconstrued the provisions of the deed of trust (F. R. 12-60) and of the bonds (F. R. 14-17; 775-787) by reading into the same matters clearly not contained therein in the following (R. 134; 25 A. (2d) at p. 386):

> "Specifically, no holder of any bond or coupon was permitted to institute any suit or proceeding for foreclosure, or for any other remedy, except upon notice of the defaults, request by the holders of the bonds in the specified amount, and subsequent refusal of the trustees to act, or unreasonable delay on their part."

And again by holding (R. 140; 25 A. (2d) p. 389) that—

> "Here, the bonds expressly referred to the indenture for a statement of the rights of the bondholders. The bondholders themselves were expressly denied the right to sue for their own protection except in certain defined circumstances."

And again and in the same respect, by misstating the reasoning of the Superior Court by the inclusion of the italicized words in the following quotation from the opinion (R. 132; 25 A. (2d) p. 385):

> "The reasoning of the Court was this: In a suit to foreclose a mortgage securing an issue of bonds, the trustee represents all bondholders in all things relating to their common *or individual* interest in the trust property, *or in the bonds;* but the trustee cannot, by

implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, he has his origin or existence."

6. With respect to the application of the doctrine of representation, the Supreme Court of Delaware erred in holding that the Trustee Complainants in the Foreclosure Cause represented Phoenix in the litigation of contractual claims and counterclaims unrelated to the trust *res* or the interest of Phoenix as a bondholder therein.

7. The Supreme Court of Delaware erred as a matter both of law and of fact in holding (R. 141; 25 A. (2d) p. 390):

"* * * Essential privity between the trustees and their beneficiaries was not wanting. * * * At least, there was no conflict of opinion between the trustees, as representatives of the bondholders, and Phoenix, as the holder of nine-tenths of the bonds, in this regard. * * *"

8. It cannot be ascertained from the opinion of the Supreme Court of Delaware whether petitioner is supposed to be estopped by the decree of December 1, 1936 in the Foreclosure Cause (1) because, as a bondholder, it was presumably represented by the Trustees to the extent here under consideration, or (2) because of its supposed participation in the proceeding. If the latter, the holding is contrary to the facts. If the former, the error is the substantive error of law heretofore stated under this heading.

9. In holding (R. 140; 25 A. (2d) p. 389) that by substantive law of Iowa and Federal Equity Rule #37 the trustee of an *express* trust may sue in his own name, the court overlooked the indisputable fact that, under the indenture and bonds, there was no *express trust* involving the notes in suit below.

Essential Limitations in Determining the Scope of an Adjudication and the Application of the Doctrine of Res Adjudicata.

(See Argument *infra* pp. 45-50)

10. The Supreme Court of Delaware erred in failing to limit the scope and the effect of the decree of December 1, 1936 in the Foreclosure Cause to the justiciable issues of that cause as defined by the pleadings.

11. Said court further erred in failing to observe and give recognition to an essential limitation of the doctrine of *res adjudicata* arising out of the *prayers for relief* contained in the complaint in the proceeding relied upon as an adjudication.

12. Said Court further erred in its opinion (R. 143; 25 A. (2d) p. 391) in holding that the United States District Court in the Foreclosure Cause was justified in applying a so-called "principle of equitable set-off" in a situation where set-off, recoupment or counterclaim in any form had not been pleaded or otherwise put in issue and in holding that, under such supposed principle, an adjudication with respect to an impleaded, untendered issue will support the defense of *res adjudicata*. Furthermore, the Delaware court's statement that "Error in this respect was assigned by Phoenix in its appeal, and was overruled" (R. 143; 25 A. (2d) p. 391) is a manifest error and wholly unsupported by the record.

13. The Supreme Court of Delaware, by repeated references in its opinion to the opinions and findings of the federal court and of the Master overlooked and ignored the rule that the *decree* of December 1, 1936 in the Foreclosure Cause, being clear and unambiguous, the scope and extent of the adjudication is to be determined thereby and that there is no justification for reference to opinions or findings to determine the scope of an adjudication.

The Notes in Suit Below as "Consideration" for Bonds Involved in the Foreclosure Cause.

(See Argument *infra* pp. 50-52)

14. The Supreme Court of Delaware overlooked or disregarded the undisputed fact that $20,100 of bonds of the Bridge Company were issued, not as consideration for its notes *but as collateral security only for said obligations.*

15. Said court overlooked or disregarded the fact that the $20,100 of bonds thus issued *as collateral only* to secure certain indebtedness of the Bridge Company to Phoenix (including the $3125 and $2000 notes in suit), were issued directly to Phoenix; that neither of the notes in suit was in any way involved in any transaction to which System was a party, and on the contrary, represented advances made directly by Phoenix to Bridge Company after System had disposed of all of its interest in Bridge Company and had gone out of business.

16. Said Court misstated the facts in holding (R. 132; 25 A. (2d) p. 385) that the mortgage deed of trust was given "by the Bridge Company to the complainants as trustees to secure an issue of bonds, *the most of which* were held by Phoenix Finance System, Inc., predecessor of Phoenix," which statement, though wholly incorrect, is pertinent here as evidencing the disregard by the Delaware Court of the status of the notes in suit as obligations *originating with petitioner* and for which Bridge Company bonds were deposited as *collateral only* without extinguishing the obligations thereof.

The Effect of Denial of Certiorari by the Supreme Court of the United States.

(See Argument *infra* pp. 52-53)

17. The Supreme Court of Delaware indulged in obvious error in giving decisional effect (R. 142; 25 A. (2d) p.

390) to a denial of certiorari by the Supreme Court of the United States, contrary to the express decisions of this court on the subject.

Statement of the Case.

The Summary Statement of the Matter Involved (*ante*, pp. 1-3) and the Statement with respect to the Foreclosure Cause and the issues, parties, proceedings and decree therein (*ante*, pp. 7-13) present, it is believed, the essential facts necessary to a determination of this case. The Foreclosure Record is voluminous, however, and it may become necessary to supplement the factual statement with respect thereto at final argument.

ARGUMENT.

A.

The Lack of Federal Jurisdiction to Support the Decree of December 1, 1936 as an Adjudication Against Petitioner.

The District Court in the Foreclosure Cause was without jurisdiction under Art. III, Sec. 2, of the Federal Constitution to render an adjudication against Phoenix with respect to the $3125 and $2000 notes in suit below. See also Act of March 3, 1911, 36 Stat. 1091; 28 U. S. C. A. Section 41 (1). Petitioner suggests however that a construction of the decree of December 1, 1936 in the Foreclosure Cause limiting the effect of such decree to a denial of foreclosure in a cause *quasi in rem*, as hereinafter contended, does not raise or present the constitutional and jurisdictional question here under discussion.

On the other hand, any extension of the scope of that decree and particularly the extension recognized by the Supreme Court of Delaware in the case below, states a demonstrable case of lack of Federal jurisdiction under

the decision of this Court in *Indianapolis* v. *Chase National Bank*, 62 S. Ct. 15; 86 L. Ed. 27; Adv. Ops. Nos. 10-13, October Term, 1941. In that case this Court stated the following familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship:

> 1. It is the duty of the court to "look beyond the pleadings and arrange the parties according to their sides in the dispute."
>
> 2. It must be ascertained from the "principal purpose of the suit" and the "primary and controlling matter in dispute" whether the necessary "collision of interest" exists.

In the *Indianapolis* case this Court recognized the actual controversy as existing between an Indiana corporation and an Indiana municipality and with respect thereto said:

> "* * * such realignment places Indiana 'citizens' on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship. We are compelled to the conclusion that the District Court was without jurisdiction."

In discussing the constitutional and statutory requirement with respect to diversity of citizenship as a jurisdictional prerequisite in the Federal courts, this Court further said:

> "These requirements, however, technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the Federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. [Citing authorities.] The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming bur-

> den of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business. [Citing authorities.] 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. * * * Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the state has defined.' [Citing authority.] In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. [Citing authorities.]"

In the *Indianapolis* case this Court also referred to *Dawson* vs. *Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 197 U. S. 178; 25 S. Ct. 420; 49 L. Ed. 713 as authority for the stated doctrine. The governing principles of both cases when applied to the analogous facts in the case *sub judice* can leave no doubt as to the lack of federal jurisdiction to adjudicate the claim of petitioner (a Delaware corporation) against the Bridge Company (a Delaware corporation) with respect to liability or non-liability on promissory notes of the latter given to and held by the former or with respect to counterclaims or set-offs between the same parties.

It is also significant that the *Indianapolis* case involved an earlier denial of certiorari *in the same case.* The case at bar involves a denial of certiorari in a former case coming to this Court from another juridiction where the petition raised the same jurisdictional question here presented. Under a subsequent heading of this argument the petitioner directs the court's attention to the obvious

fallacy in the opinion of the Delaware Supreme Court as to the effect of the denial of certiorari in the Foreclosure Cause. Whatever doubt may have existed heretofore on the subject, the *Indianapolis* case clears a path for a consideration by this Court on the merits of the question of Federal jurisdiction in the Foreclosure Cause with respect to issues of the character raised in the Delaware court below. In fact the *Indianapolis* case is a most persuasive if not controlling authority in favor of the granting of the writ herein prayed because the controversy *sub judice*, like the *Indianapolis* case (p. 31 of 86 L. Ed.) presents "an important judicial issue involved in the litigation".

On that decisive issue both the minority and majority opinions support petitioner's position. In the Foreclosure Cause the District Court placed petitioner as a plaintiff in the pleadings opposite the Bridge Company, a citizen of the same state. As Mr. Justice Jackson said in the *Indianapolis* case (p. 34 of 86 L. ed.) "The measure of jurisdiction should be taken from the pleadings unless the claims are frivolous on their face." The majority opinion in analyzing "realities" of the record defines the word "controversy" as follows (p. 32 of 86 L. Ed.):

> "What Chase wants Indianapolis Gas wants and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase, when, as a matter of fact, the interests of the City and Indianapolis Gas are opposed to one another. Therefore, if regard be had to the requirements of jurisdictional integrity, Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction. But such realignment places 'Indiana citizens' on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship * * *."

Paraphrasing the foregoing as applied to the Foreclosure Cause: *what Phoenix wanted the Bridge Company did not want and vice versa, the interests of such parties being unalterably opposed.* The alignment of parties by the placing of Phoenix as a plaintiff in the cause and defendant to the petition of intervention (F. R. 85-86) placed Delaware citizens on both sides of the litigation and precluded assumption of jurisdiction upon diversity of citizenship.

The Supreme Court of Delaware has treated the Foreclosure Cause as though one question that "permeated this litigation" was the Bridge Company's liability to Phoenix on the promissory notes in suit and any set-offs or counterclaims against the same. As to such question it appears obvious that the *only* parties in interest were the Bridge Company and Phoenix. Even as to the larger issue of fraud, the parties in interest to the controversy were the Bridge Company and its stockholders who asserted it and Phoenix and the other bondholders who denied it.

The Trustee Complainants, chosen by the Bridge Company, had no pecuniary interest in any phase of the controversy. By the indenture (F. R. 51) the Trustees had "no responsibility for * * * the validity of this instrument * * * or for any bond or coupon issued hereunder * * *." The Trustee Complainants remained unaffected no matter what the ultimate decision. They were friends of both sides, adversaries of neither. Under the "realities of the record" the only "collision of interest" and the "primary and controlling matter in dispute" not only on the face of the record as made, but in fact and in substance as well, was between two Delaware corporations, Phoenix and the Bridge Company, and between them alone.

Even the minority opinion in the *Indianapolis* case recognizes the basic principles that underlie this case. There it was said (p. 35 of 86 L. Ed.):

> "The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy where no real cause of action is asserted against him by the plaintiff * * *."

In the Foreclosure Cause the intervener's motion was that certain corporations be made parties *defendant* (F. R. 83). The court concluding that Phoenix was a successor to one of the named corporations "ordered and directed that the Phoenix Finance System, Inc. and the Phoenix Finance Corporation be made parties *plaintiff* in this cause and *defendants to the petition of intervention* * * *." (F. R. 86). This was obviously done because there was no controversy between the Trustee Complainants and Phoenix. If brought in at all, Phoenix and the Trustee Complainants had to be considered "partners in litigation." It was the Delaware companies (Phoenix and the Bridge Company) whose "wants" clashed.

In fact the intervener's motion alleged that Phoenix Finance System, Inc. and others were *"necessary and proper parties to this cause"* (F. R. 84) and Phoenix as the alleged successor of System was therefore treated as in the same category. This circumstance coupled with the definitive alignment of Phoenix as a party plaintiff and defendant to the petition of intervention on the issue of fraud and lack of consideration, with respect to which the Trustee Complainants had no real interest, presents, it is submitted, an even stronger argument than appeared in the *Indianapolis* case on the point of lack of Federal jurisdiction.

Although, as herein shown, petitioner and the Bridge Company in the Foreclosure Cause were the real apposed

parties, the District Court held that Phoenix "was merely a formal and not an indispensable" party (F. R. 211; 19 F. Supp. p. 142). The Circuit Court of Appeals also said that "it is apparent that the trustees are the only necessary and indispensable parties" (F. R. 1692; 98 F. 2d p. 420).

The respondent is on the horns of a legal dilemma. If the decree in the Foreclosure Cause constituted such an adjudication against Phoenix as to support the plea of *res adjudicata* in Delaware suit on the notes, Phoenix must of necessity have been an indispensable party to such adjudication. If on the other hand Phoenix was such indispensable party, no federal jurisdiction as to such purported adjudication could have existed. The federal courts, in order to sustain their jurisdiction, were obliged to define Phoenix' status as a "formal" rather than an indispensable party. Such status, if here accepted, of necessity prevents the decree from having the qualities of an adjudication *in personam* against Phoenix sufficient to sustain the plea in the Delaware case.

While, under this heading, the "indispensable" status of Phoenix in the Foreclosure Cause is the accepted hypothesis, the reasons underlying the holdings of the federal courts as to Phoenix' "formal" status, are apparent from a consideration of the principles next stated, particularly when it is kept in mind that the federal courts were obviously seeking to sustain federal jurisdiction in a cause for *mortgage foreclosure* and were not concerned with the qualities of the decree as an adjudication *in personam* against Phoenix.

The joinder of defendants who are citizens of the same state as complainants will not oust federal jurisdiction *where they are not indispensable parties.*

Weiland v. *Pioneer Irr. Co.,* 238 Fed. 519; aff. 259 U. S. 498.

Nor will the joinder of a formal or nominal party in such case deprive the federal court of jurisdiction.

Wormley v. *Wormley*, 21 U. S. 421;
Carneal v. *Banks*, 23 U. S. 181;
Shields v. *Barrow, supra.*

For jurisdictional purposes formal or nominal parties may be disregarded.

McNutt v. *Bland*, 2 How. 9, 15, 11 L. Ed. 159;
Browne v. *Strode*, 5 Cranch 303, 3 L. Ed. 108;
Susquehanna & W. V. R. & C. Co. v. *Blatchford*, 11 Wall. 172, 177, 20 L. Ed. 179, 181;
Walden v. *Skinner*, 101 U. S. 577, 25 L. Ed. 963.

Nor in a class suit will the voluntary intervention as plaintiff of a citizen of the same state as the defendant oust federal jurisdiction.

Supreme Tribe of Ben-Hur v. *Cauble*, 255 U. S. 356.

As to the issue of mortgage foreclosure, there was undisputed jurisdiction, the trustee complainants being respectively, a corporation of Iowa and an individual resident of Wisconsin and the defendant Bridge Company being a Delaware corporation. If, however, the bill and answer in the Foreclosure Cause or an intervention petition and answer thereto be construed as raising issues with respect to the Bridge Company's liability to Phoenix on contracts, notes and open accounts unrelated to the security involved in the foreclosure, or an issue with respect to the cancellation of bonds, then petitioner as a bondholder was an indispensable party to such issues. As to such assumed issues Phoenix and the Bridge Company (both Delaware corporations) must be arranged "according to their sides in the dispute". This does not seem to be a question of *ousting* federal jurisdiction. That jurisdiction existed and remained with respect to the issue of mortgage foreclosure.

As to the other assumed issues, federal jurisdiction never existed from the beginning.

It cannot be controverted that with respect to the liability or non-liability of the Bridge Company on the promissory notes in suit below, petitioner was an indispensable party to any adjudication. An indispensable party has been defined as one who not only has an interest in the controversy but has interest of such a nature that a final decree cannot be made without affecting that interest.

Cunningham v. *Macon & B. R. R. Co.*, 109 U. S. 446;
Shields v. *Barrow, supra.*

Even if the petitioner were considered as a party charged with fraud in the Foreclosure Cause, it would have been an indispensable party to establish that fraud.

Swan Land and Cattle Co. v. *Frank*, 148 U. S. 603, 610.

Assuming, as the Supreme Court of Delaware held, that the decree in the Foreclosure Cause did "affect" the interest of petitioner so as to constitute an adjudication against it to support a plea of *res adjudicata*, a case has been stated within the doctrine of the *Indianapolis* case demonstrating complete lack of federal jurisdiction.

Furthermore, if we are to assume an issue as to the cancellation of the mortgage and bonds as prayed (F. R. 68, 82), petitioner as a bondholder was a necessary and indispensable party by virtue of the applicable Iowa decisional [10]

[10] It has heretofore been pointed out that the only applicable Iowa *statutory* law (Sec. 10968, Code 1935) is in substance the same as Federal Equity Rule #37. Thereby it is provided that a "trustee of an *express* trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted." It has been shown that there was no trusteeship created either expressly or by implication with respect to the notes in suit below. Obviously this statute has no bearing on a proceeding having as its objective the cancellation of a deed of trust and bonds issued thereunder under circumstances here presented.

law. In Iowa it is held that the holder of the indebtedness secured by a mortgage is a "necessary" party to a suit attacking the mortgage for invalidity of the indebtedness.

Clemons v. *Elder,* 9 Iowa 272.

In suit in equity to invalidate a written instrument alleged to be fraudulent, the Iowa Court has held that all parties thereto must be before the Court.

Miller et al. v. *Mahaffy et al.,* 45 Iowa 289.

In another case, the Supreme Court of Iowa recognized the fundamental distinction between the representative powers of the Trustee with respect to foreclosure of the security and the Trustee's powers with respect to the validity of the underlying indebtedness.

Iowa Title & Loan Company v. *Clark Bros. et al.,* 213 Iowa 875, 237 N. W. 336.

See also *Federal Land Bank of Omaha* v. *Jefferson, supra,* where the court cited the Iowa Code as holding (p. 857 of 295 N. W.) that:

> "* * * The judgment in rem is measured by the property in Court."

These are rules of substantive law in Iowa and as such were controlling on the Federal court in the Foreclosure Cause.

Erie R. R. v. *Tompkins,* 304 U. S. 64;
Ruhlin v. *New York Life Insurance Co.,* 304 U. S. 202.

The foregoing principles as established by the decisions of the Iowa courts have also been recognized by this Court. Thus, in *Shields* v. *Barrow, supra,* this Court found absence of original jurisdiction after thirteen years of litigation in the lower Federal courts (p. 158 of 17 How.). There, as here, it was sought to invalidate a contract, one

of the parties to which was of the same state as the party raising the controversy. It was held that "a bill to rescind a contract presents an example" of indispensable parties (p. 139). The presence of each party to the contract is a prerequisite to equity jurisdiction. Equity could make no decree without them. And if, by joinder, one destroyed diversity of citizenship, it ousted jurisdiction of the Federal courts.

To the same effect is *Ribon* v. *R. R. Companies,* 16 Wall. 446, 450, holding that where "the interests of those present and those absent are inseparable, the obstacle is insuperable."

See also:

Northern Indiana R. Co. v. *Michigan Central R. Co.,* 15 How. 233, 245;

Minnesota v. *Northern Securities Co.,* 184 U. S. 199, 246, 247.

The question of Federal jurisdiction was raised on petition for writ of certiorari to this Court in the Foreclosure Cause (No. 438 Oct. Term, 1938; denied 305 U. S. 650, 676). Even though the question now before the court should be considered as properly raised on the former petition, the denial thereof imports no authoritative decision on the subject (See *infra,* Heading "E" of Argument pp. 52-53). As this Court said in *Indianapolis* v. *Chase National Bank, supra* (p. 32 of 86 L. Ed.):

> "And, of course, this court by its denial of certiorari when the case was here the first time could not confirm the jurisdiction which Congress has denied."

However, the jurisdictional problem need not be regarded as having been presented on the first petition because at that time the scope and effect of the decree of December 1, 1936 was not before this Court. The question is first

raised in the instant case where the Delaware court is asked to consider the former Federal decree as evidence to sustain a plea of *res adjudicata*. In this connection the Delaware Supreme Court has so construed that decree as to spell out lack of Federal jurisdiction with respect to the matter in dispute.

B.

The Status of Petitioner as a "Represented" Party to the Foreclosure Cause.

Admitting, for purposes of argument only, an unlimited Federal jurisdiction in the Foreclosure Cause, the decree of December 1, 1936, therein cannot in any event be sustained as an adjudication against petitioner, entitled to faith and credit in the Delaware court unless the court finds that the Trustee Complainants were the authorized representatives of petitioner in that cause with respect to the identical issues presented in the court below. The Federal courts in that cause held that "the trustees were the only indispensable parties plaintiff, had exclusive control of the litigation;" that Phoenix "was merely a formal and not an indispensable" party (F. R. 211; 19 F. Supp. p. 142); and that "it is apparent that the trustees are the only necessary and indispensable parties plaintiff" (F. R. 1692; 95 F. (2d) p. 420).

Again passing over the jurisdictional question, *supra*, it may be said that petitioner could not have been an indispensable party because no decree was sought against it.

Payne v. *Hook*, 7 Wall. 425, 19 L. Ed. 260;

Union Bank of Louisiana v. *Stafford*, 12 How. 327, 13 L. Ed. 1008;

Wormley v. *Wormley*, 8 Wheat. 421, 5 L. Ed. 651;

Niles-Bement-Pond Co. v. *Iron Moulders Union, &c.*, 254 U. S. 77, 41 Sup. Ct. 39, 65 L. Ed. 145;
Horn v. *Lockhart*, 17 Wall. 570, 21 L. Ed. 657.

No decree was rendered against petitioner. The decree had only the essential quality of a decree *denying foreclosure of a mortgage* (F. R. 204).

Was petitioner "represented" in the Foreclosure Cause by the Trustee Complainants with respect to the litigation of Bridge Company liability or non-liability on the $3125 and $2000 notes? In order to answer this question it is first necessary to determine whether such representation was *expressly authorized* by the indenture.

Manning v. *Norfolk S. R. Co.*, 29 F. 838;
Halle v. *Van Sweringen Corp.*, 37 Del. 491, 185 A. 236;
6 Fletcher, Cyc. Corp., Sec. 2751, p. 616.

Restrictions on the rights of bondholders, giving exclusive powers to trustees, being in derogation of the common law rights of creditors, are to be strictly construed and are effective only insofar as they are clear and reasonably free from doubt. In this respect the provisions of an indenture will not be extended by implication.

Japha v. *Delaware Valley Utilities Co.*, 40 Del. 599, 15 A. (2d) 432.

The decision of the Supreme Court of Delaware is predicated upon *express* authority said to appear in that instrument. In this the court was in obvious and demonstrable error.

There is nothing in the indenture which precludes a bondholder from suing for the *debt* evidenced by the bonds held by him. In fact, such right is expressly recognized. Art. V, Section 13, of the indenture (F. R. 43-44) provides that no bondholder shall have the right to institute any suit "*for the foreclosure of this indenture or for the execu-*

tion of any trust thereof, * * * *or for any other remedy hereunder,"* unless the bondholders shall have given previous notice to the trustees and the trustees had unreasonably delayed to comply with the bondholders' request. The meaning of the foregoing is fully explained by the provision that it is "*understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided* * * *."

The foregoing is made entirely clear when considered in the light of the concluding paragraph of said section (F. R. 44):

> "*Nothing in this Section or elsewhere in this Indenture or in said bonds or in the coupons attached thereto shall affect or impair the obligation of the Company which is unconditional and absolute to pay the principal and interest of said bonds to the respective holders thereof and of the coupons attached thereto at the respective due dates therein stated, nor affect or impair the right of action which is absolute and unconditional of such holders to enforce such payment.*"

The bonds (F. R. 14-17, 775-787) make reference to the indenture "for a description of * * * the rights of the holders of said bonds *in respect of such security.*" (F. R. 15).

The court below was entirely correct in observing (R. 140; 25 A. 2d p. 389) that the substantive law of Iowa and Federal Equity Rule #37 permitted the trustee of an *express* trust to sue in his own name. The court failed to observe however that there was no trust express or otherwise with respect to any *debt* owed by the Bridge Company to a bondholder, and particularly no circumstance from which any trust may possibly be spelled out with respect

to the promissory notes in suit below. As to these notes no express trust existed even by reasonable implication.

In fact petitioner could not legally have conferred power upon the mortgage trustee to litigate the notes in suit even if there had been a clear intention in this regard. In *Mackay* v. *Randolph Macon Coal Company* (C. C. A. 8th) 178 F. 881, the court said (pp. 884-885):

> "Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of parties. (citing cases) Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest. The only exceptions to that rule here important are these: (1) The trustee of an express trust may maintain an action in his own name on behalf of the beneficiary. *To come within this exception, however, the trustee must be the holder of the property or obligation out of which the action arises. Here, as already pointed out, the trustee under the mortgage is not the holder of the bonds.* (2) A person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. *The trustee under the mortgage comes within this exception as to the security, but not as to the bonds, for they are not payable to the trustee.* The deficiency decree, therefore, must be referred to the covenant in the mortgage, and like the mortgage itself, is collateral to the bonds, and constitutes no bar to an action thereon. The debt underlying both is the same, but the promises are distinct and give rise to separate causes of action." (emphasis supplied.)

See also:

In re *Ebeling* (C. C. A. 9th), 123 F. (2d) 520.

The scope and effect of a former adjudication to which a trustee was defendant as binding upon an individual *cestui*, the holder of certificates of indebtedness secured by an

indenture of trust, was before the court in *National Salt Co.* v. *Ingraham* (C. C. A. 2d) 143 F. 805. In stating the essential limitations on the trustees' right of representation the court used the following language (pp. 809-810):

> "* * * we are of opinion that the decree against the trustee concluded the plaintiff only to the extent to which it determined his rights or interest in the trust property. The trust company was for certain purposes the agent and fiduciary of the certificate holders. By the terms of the trust agreement, it was its duty to hold, manage, and control the shares of stock, which were deposited with it until the certificates should be fully paid, and until such time it was to collect the dividends accruing upon the shares and apply them towards the payment of the certificates; but it had no power to sell the shares or to enforce in any way the payment of the certificates. It was a necessary party to the Ohio suit, because in its absence there could have been no effectual decree annulling the trust agreement. Its powers as a trustee were more limited than those of the ordinary trustee for bondholders upon a trust deed or mortgage. The latter represents the bondholders in all legal proceedings affecting the trust property, and in a suit to foreclose the mortgage, or to annul it, the bondholders are not necessary parties, and whatever the trustee does, in the absence of fraud or bad faith on his part, concludes them in respect to their equitable title to the trust estate. We are aware, however, of no authority for the proposition that he represents them respecting matters as to which he has no control and concerning which he has no voice. He is not a necessary or a proper party in a suit at law by a bondholder to recover the principal or interest upon the bonds, because he has no title legal or equitable to the bonds, or to the moneys payable by the terms of the bonds. The decisions in which it has been held that the bondholder was concluded by the former adjudication against the trustee were made in cases in which the bondholder sought by a subsequent suit to subject

> the trust estate to the payment of his bonds." (Reference to *Kerrison* v. *Stewart, infra; Richter* v. *Jerome, infra;* and *Shaw* v. *R. R. Co.,* 100 U. S. 611; 25 L. Ed. 757.)
>
> * * * * * * *
>
> "Conceding for the sake of argument that the present trustee had as extensive a capacity as that of the ordinary mortgage trustee, he certainly had no power to represent the certificate holders for any purpose other than that of the management and protection of the trust estate. While the decree against him will effectually preclude the certificate holders from resorting to the trust fund for the collection of the moneys due them, it does not in our opinion impair in the slightest the rights of those not made defendants to the suit to recover at law the amount due thereon from the present defendant. We conclude that the trial judge properly ruled that the former decree was not an estoppel against the plaintiff."

This court has also recognized that one who sues as representative of a class must have an actual interest in the controversy in like right with those he proposes to represent.

> *Georgetown* v. *Alexandria Canal Co. et al.,* 12 Pet. 91; 9 L. Ed. 1012.

The Delaware Superior Court succinctly stated petitioner's position with respect to the law of this case. In *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company,* 14 A. (2d) 386, that court said (p. 389):

> "We think that in a suit to foreclose a mortgage securing a bond issue the doctrine of representation of the bondholders by the Trustee means that *the Trustee represents all bondholders in all things relating to their common or individual interest in the trust of property, or in the bonds, but that such rep-*

resentation does not extend beyond a consideration of the trust property, or of the bonds secured thereby. The Trustee cannot, by implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, the Trustees have their origin or existence. The subject matter upon which the representation would apply must be one as to which both the Trustee and the person represented have an interest. In this case we are not directly concerned with the question as to whether the representation of a bondholder by a Trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceeding such inquiry should be had. No such question is here presented, for we are in no way interested in the bonds, as such.

The foregoing conclusion is not, we think, in any way inconsistent with Kerrison v. *Stewart*, 3 Otto. 155, 93 U. S. 155, 23 L. Ed. 843; *Mercantile Trust Co.* v. *Schlafly*, 8 Cir., 299 F. 202; *Richter* v. *Jerome*, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132; *Beals* v. *Illinois, etc., R. R. Co.*, 133 U. S. 290, 10 S. Ct. 314, 33 L. Ed. 608; or *Elwell* v. *Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998." (Emphasis supplied.)

The doctrine of representation is confined to the subject of the trust. The trustees represent the bondholder and in things *"relating to their common interest in the trust property."*

Kerrison v. *Stewart*, 3 Otto. 155; 93 U. S. 155; 23 L. Ed. 843;

Central Trust Co. v. *California & N. R. Co.*, 110 F. 70.

The Trustee is a special, not a general, agent of the bondholders and is limited to the legitimate purposes of the relation he sustains to the security and the parties entitled to the benefit thereof.

Mackay v. *Randolph Macon Coal Co., et al., supra;*
Moran, et al., v. *Hagerman*, 64 F. 499 (C. C. A. 9th);

Harrisburg & Eastern R. Co.'s Appeal (Supr. Ct. Pa. 1888), 15 A. 459, 1 L. R. A. 230;
Fonda J. & G. R. Co. v. *New York Trust Company*, 233 App. Div. 443, 254 N. Y. S. 266;
Short on Railroad Bonds and Mortgages, Secs. 274, 497.

There is a vital distinction between the representative powers of a trustee with respect to foreclosing the security and the powers of a trustee with respect to the validity of underlying indebtedness unrelated to the security or the individual interest of a bondholder therein.

Iowa Title and Loan Company v. *Clark Bros., et al.*, 213 Iowa 875, 237 N. W. 336.

Petitioner's position is also well stated in the Eighth Circuit case of *Toucey* v. *New York Life Ins. Co.*, 102 F. (2d) 16 (Reversed on other grounds, 62 S. Ct. 139; 86 L. Ed. 1; Adv. Ops. Nos. 16 and 19 October Term, 1941) as follows (p. 19):

> "The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien enforceable in equity. *In such cases, the equity court may not proceed to adjudicate a claim of legal liability upon a promissory note or upon a purely legal obligation unrelated to equitable liens.* In such cases, the legal controversy presented is dependent and distinct." (Emphasis supplied.)

It is to be observed that mortgage foreclosure is a proceeding in *rem* or *quasi in rem*.

Ingram v. *Jones, et al.*, 47 F. 2d 135, 141;
Wilson v. *Alliance Life Ins. Co.*, 108 F. (2d) 150, 152;
Bride, et al., v. *Stormer, et al.*, 291 Ill. App. 502, 10 N. E. 2d 208, 209.

In the Foreclosure Cause the Trustees proceeded by an *in rem* or *quasi in rem* action to exercise the right of foreclosure conferred by Article V, Section 3 (c) of the Mortgage Deed of Trust (F. R. 37-38). A decree in such a case "does not bar litigation anew by a stranger of facts upon which the decree in rem is based."

Riley v. *New York Trust Co., supra.*

The remedy sought was equitable foreclosure. The "rights of the bondholders" under said Article V, Section 3 (c) of the indenture involved merely the right, by foreclosure, to apply the security to the payment of the bonds. *To this extent only were the Trustees the agents of the bondholders.* No bondholder directly or indirectly conferred upon the trustees the right to litigate for it, purely legal claims unrelated to the trust *res* and the bondholders' interest therein. As stated by this Court in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 194; 44 L. Ed. 423, 431:

> "The complainants were trustees under the mortgage, and had no personal interest in the bonds, but held legal title to the mortgage, which they were foreclosing for the benefit of others."

The doctrine of trustee representation is confined to the subject of the trust, or in other words, the property mortgaged and the equities of the bondholders therein. It does not extend to the indebtedness secured thereby. This principle is clearly stated in the case of *Central Trust Co. of New York* v. *California & N. R. Co., supra,* as follows (p. 72 of 110 F.):

> "The principle that the trustee named in the mortgage given to secure the payment of bonds is the proper party to protect the interest of all bondholders, and that individual bondholders will not be permitted to

> take part in the litigation, is not applicable to a controversy involving the validity of bonds for the satisfaction of which the foreclosure proceedings are being conducted."

This case is even further removed from the foregoing principles of trustee representation because here the issue relates to the validity and enforceability of notes for which bonds are collateral only.

Certain decisions of this and other Federal courts relied upon by respondent not only do not, when analyzed, support its position on the question of trustee representation, but, on the contrary, lend great measure of support to the principles upon which petitioner's case rests.[11] Of these cases *Thomas* v. *Brownville R. Co.*, 109 U. S. 522, requires special mention. In that case the primary problem of the case *sub judice*, viz., the legal effect of a decree in a foreclosure suit as an adjudication against a "formal party" bondholder with respect to impleaded issues, and issues in respect of which the bondholder was not "represented" by the trustee, was not involved. However, in the case there was a cross bill praying for the affirmative relief of cancellation, an issue to which the bondholder was an indispensable party and with respect to which Federal jurisdiction existed. By their cross bill the interveners "became actors" (p. 526) and were held (p. 526) to be "amenable to the rule that they who seek equity must do equity." Even though the mortgage and bonds involved in the Foreclosure Cause were "fraudulently issued" (F. R. 204), equity requires the recognition of

---

[11] These cases include *Kerrison* v. *Stewart, supra; Elwell* v. *Fosdick*, 134 U. S. 500; *Richter* v. *Jerome*, 123 U. S. 223; *Thomas, Trustee*, v. *Brownville etc. R. Co.*, 109 U. S. 522, and *Mercantile Trust Co.* v. *Schlafly*, 299 F. 202.

petitioner's untainted claims on the notes in suit. That relief was not procedurally available in the Foreclosure Cause. It was available below.

The Supreme Court of Delaware has gone far beyond the enunciated principles of the precedents and has extended the doctrine of representation to include (a) representation of *individual* bondholders' interests in the *trust property,* (b) the representation of the *individual* bondholders' interest in the *bonds,* and, even more astounding, (c) the representation of *an individual* bondholder's interest in promissory notes given by the mortgagor to such bondholder, where bonds were *collateral only thereto.*

C.

Essential Limitations in Determining the Scope of an Adjudication and the Application of the Doctrine of Res Adjudicata.

This court observed in *Riley* v. *New York Trust Co., supra,* that "By the Constitutional provision for full faith and credit, the local doctrines of *res adjudicata,* * * * become a part of national jurisprudence * * *," and that where the former court "has jurisdiction of the parties and the subject matter, its judgment controls in other states * * *."

In the foregoing it has been demonstrated that, in the Foreclosure Cause, petitioner was not an indispensable party by representation or otherwise, to support an adjudication against it with respect to the notes in suit. There are, however, other essentials lacking in the Foreclosure Cause, essentials necessary to sustain the plea of *res adjudicata* below, and the federal court's "jurisdiction of the * * * *subject matter.*"

First, an adjudication to be entitled to faith and credit in another jurisdiction must be within the issues as defined by the pleadings.

Reynolds et al. v. *Stockton, Receiver,* 140 U. S. 254, 35 L. Ed. 464;

Southern Pacific R. Co. v. *U. S.,* 168 U. S. 1, 42 L. Ed. 355, 377;

Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 319; 71 L. Ed. 1069, 1071;

Duchess of Kingston's Case, 1 Leach 146, 168 Eng. Repr. 175; 2 Smith's Lead. Cas. (12th ed.) 754;

Bates v. *Bodie,* 245 U. S. 520;

Cromwell v. *County of Sac,* 94 U. S. 351;

1 & 2 Freeman on Judgments (5th Ed.), Sec. 627, p. 1322; Sec. 337, p. 674; Sec. 355, p. 738.

In the last cited text, the principle is stated in the following apt language (p. 738):

> "* * * For courts cannot *ex mero motu* set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings * * *."

There were no pleadings in the Foreclosure Cause which directly or indirectly brought in issue the validity or enforceability of the $3125 and $2000 notes in suit as between petitioner and respondent.

Second, in order to determine the *subject matter* of litigation, it is necessary to examine the prayers of the moving pleading. In *Federal Land Bank of Omaha* v. *Jefferson* (Iowa Supreme Court January 1941) 295 N. W. 855, the court said (p. 857):

> "* * * However, it is necessary not only for the court to have jurisdiction of the parties, but also juris-

diction of the subject matter, and even though the court has jurisdiction of the parties, if it has no jurisdiction of the subject matter, it has nothing before it to determine (citing cases).

In determining what constitutes the subject matter of the litigation, it is necessary to examine the prayer of the plaintiff's petition. *This court has repeatedly recognized that the relief to be afforded is limited by the prayer of a petition"* (citing cases) (emphasis supplied).

The prayers in the bill for foreclosure were the usual prayers in such as *in rem* or *quasi in rem* proceeding (F. R. 10-11) and no relief of any character was prayed against petitioner or with respect to the $3125 and $2000 notes in suit.

Third, there could have been no valid adjudication with respect to a set-off or counterclaim without appropriate pleading. It has been noted that the District Court held the $3125 note [12] valid but sustained an impleaded, unasserted and unliquidated counterclaim against the same, in no way connected with the mortgage debt. This was not a proper subject of set-off at law and will not be allowed in a suit in equity to foreclose a mortgage.

Smith v. *Billings,* 62 Ill. App. 77, 85;

Jennings v. *Webster,* 8 Paige (N. Y.) 503; 35 Am. Dec. 722.

The Delaware Supreme Court while recognizing the principles here under discussion sought to justify the adjudication in this respect under a so-called principle of "equitable set-off".

Set-off is an affirmative defense and must be affirmatively pleaded in equity as well as law in order that advantage

[12] The $2000 note was not considered at all, either by the Master or the District Court.

may be taken thereof by the party in whose favor the same is assertable.

McGowan v. *American Pressed Tan Bark Co.*, 121 U. S. 575;
United States v. *Mitchell*, 205 U. S. 161;
Stanley v. *Turner*, 68 Vt. 315, 35 A. 321 (Sup. Ct. of Vt. 1896);
Freeman v. *Marsh*, 3 N. J. L. 65;
Hildebrand v. *American Fine Art Co.*, 109 Wis. 171, 85 N. W. 268;
State v. *Board of Commissioners*, 22 N. M. 562, 166 P. 906;
Wingate v. *Parsons*, 4 Del. Ch. 117;
Lattomus v. *Garman*, 3 Del. Ch. 232.

In *Lattomus* v. *Garman, supra,* the Chancellor of Delaware said (p. 236):

> "* * * Set-off does not, under the English law, as under the Civil, operate immediately as a satisfaction, *pro tanto,* leaving the balance of the larger demand as the only indebtedness between the parties. It is, under our law, only a defense, which may, or may not, be asserted in an action for the counter demand. It does not attach itself to the debts so as to pass with them. It is a personal privilege of the defendant, and depends not upon a mutuality of debts and their origin, but upon a mutuality of indebtedness between the parties to the action."

The doctrine of so-called "equitable set-off" referred to by the Delaware Supreme Court, by which, it is assumed, is meant a set-off or counterclaim assertable without pleading, is not supported by any competent authority. In the sole case cited, *Central Appalachian Co.* v. *Buchanan*, 90 Fed. 454, *the counterclaim was specifically pleaded* by cross bill filed by two answering corporations. The court said these cross-bills "were filed for the purpose of setting off against

the judgment in favor of the complainant, Buchanan, a demand for $60,000 claimed as liquidated damages arising out of a breach of the covenants of a certain conveyance * * *." In that case the doctrine of "equitable set-off" was referred to as applicable to a situation where the *legal* right may be defeated "by the interposition of assignments, receiverships or statutory liquidations." *The cited case does not hold nor does any discovered case hold that set-off, legal or equitable, may be the basis of an adjudication without appropriate pleading.*

The suggestion of the Delaware Supreme Court (R. 143; 25 A. (2d) 391) that petitioner raised this question in the Foreclosure Cause must be regarded as an inadvertent misstatement. The point was first raised in the Superior Court of Delaware in the cause below.

Fourth, there was no ambiguity in the decree of December 1, 1936 justifying any reference to the findings of the Master or Court, or to the opinions of the District or Circuit Courts to determine the adjudicated issues. The decree and not the opinion of the Court determines the scope of an adjudication.

Doyle v. *Hamilton Fish Corp.,* (C. C. A. 2d); 234 F. 47;
J. J. Hockenjos Co. v. *Lurie,* (Supr. Ct. N. J. 1934) 173 A. 913;
Mullaney v. *Mullaney,* 65 N. J. Eq. 384, 54 A. 1086.

In *The Drifter,* 35 F. (2d) 1006, the Court stated (p. 1007):

> "It is well settled that the decision or opinion of a court or the verdict of a jury does not make a matter res adjudicata."

See also:

D. L. Flack & Son, Inc. v. *West Virginia Coal Co.,* 46 F. (2d) 177;

United States v. *Davis et al.*, 3 F. Supp. 97;
Societe Vinicole De Champagne v. *Mumm Champagne & Importation Co., Inc.*, 10 F. Supp. 289.

A comprehensive statement of the rule and the reason therefor is to be found in *Bower on Res Adjudicata* Sec. 173.

The decree in the Foreclosure Cause, responsive to the pleaded issues, was merely *a denial of the right to foreclose a mortgage* (F. R. 204). It is this decree or judgment and not the opinion or findings which forms the basis of a plea of *res adjudicata* in another jurisdiction. There is no uncertainty or ambiguity in the decree of December 1, 1936. No doubt as to meaning, justifying reference to findings or opinions, can possibly exist in the mind of anyone. The Supreme Court of Delaware, however, has based its determination almost entirely upon such opinions.

D.

The Notes in Suit Below as "Consideration" for Bonds Involved in the Foreclosure Cause.

The Supreme Court of Delaware has treated this case as though bonds, secured by the deed of trust sought to be foreclosed, had been issued to petitioner *in consideration for* the $3125 and $2000 notes. In fact the case is considered as though the notes were the property of *Phoenix Finance System, Inc.* and the bonds issued to *System* and from thence found their way into the hands of petitioner. It has been heretofore conclusively demonstrated that neither assumed situation is the fact.

Petitioner held $20,100 of bonds secured by the deed of trust under foreclosure, as *collateral security* only, for certain notes (including the $3125 and $2000 notes in suit)

which notes in turn were given to secure certain advances of money *made by petitioner* to respondent.

Whatever might have been the possible effect of the decree denying foreclosure of the deed of trust upon any obligation evidenced by bonds secured by such deed of trust (this question is not here involved), such decree could not under any circumstances reach and adjudicate a debt evidenced by a note between the mortgagor and a bondholder for which debt bonds secured by the deed of trust were *collateral only*.

The debt (the $3125 and $2000 notes in suit) continued in full force independent of the security (the $20,100 of bonds in turn secured by the deed of trust) and therefore remains unaffected by the decree denying foreclosure of the deed of trust.

2 Freeman on Judgments (5th Ed.), Sec. 584, p. 1236.

The $20,100 of bonds were not received by petitioner in satisfaction of the notes in suit (with others) and cannot operate as a satisfaction. They were mere *collateral security* and the original debt remains until extinguished by payment or satisfaction.

United States v. *Hoyt, et al.*, Fed. Cas. #15409; 1 Blatch 326.

The indenture (the mortgage) was not given to secure and was not designed to secure the indebtedness of the Bridge Company to Phoenix on the notes. Even the $20,100 of bonds were not issued *to secure* that debt. They were *collateral only* to that debt. The Foreclosure Cause "was not an action for the recovery of the principal debt. It was an act for the preservation of the security."

Merced Secur. Sav. Bank v. *Casaccia*, 103 Cal. 641; 37 P. 648.

There was no finding of fraud with respect to the $3125 and $2000 notes in suit below and the consideration therefor was neither in issue nor decided. The District Court admittedly held that "the mortgage and bonds in suit were fraudulently issued" (F. R. 203). Even if the *bonds* were thus "in suit" (and this is challenged) the $3125 and $2000 notes were not, and even though the $20,100 of collateral bonds "were fraudulently issued" (and this is denied) there is no judgment or decree with respect to the notes and petitioner, it is submitted, should be free to sue thereon in the Courts of Delaware where jurisdiction of the parties and subject matter admittedly exists.

E.

The Effect of Denial of Certiorari by the Supreme Court of the United States.

It has been pointed out that the decree of December 1, 1936 in the Foreclosure Cause was affirmed by the Circuit Court of Appeals (98 F. (2d) 416) and that this court denied certiorari (305 U. S. 650, 676). The Supreme Court of Delaware apparently took the position that this Court had passed upon the substantial questions here raised and held that the refusal of this court to grant certiorari in the Foreclosure Cause imported an authoritative decision not only of the issues presented but also of "questions of jurisdiction and due process of law" (R. 142; 25 A. (2d) p. 390).

It is pointed out that the scope and legal effect of the decree could only be raised when that decree was sought to be asserted affirmatively or by way of defense in another jurisdiction. Therefore this court never had these questions before it in any event.

The Supreme Court of Delaware has indulged in most obvious and patent error in this respect. The language of the late Mr. Justice Holmes in the case of *United States*

v. *Carver*, 260 U. S. 482, 490, 67 L. Ed. 361, 364 should have put the matter at rest for all time. In that case it was said that "*the denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times.*" It is felt that it should be unnecessary to argue a point so conclusively settled. See:

Robertson & Kirkham's "Jurisdiction of the Supreme Court of the United States", Section 287, pp. 544, 545 and cited cases.

In the recent case of *Indianapolis* v. *Chase National Bank*, *supra*, this Court granted certiorari in a subsequent proceeding in litigation which had resulted in a denial of certiorari and in the later case reversed the decision of the Circuit Court of Appeals on jurisdictional grounds. In that case Mr. Justice Frankfurter said (p. 32 of 86 L. Ed.):

> "And, of course, this Court by its denial of certiorari when the case was here the first time could not confer the jurisdiction which Congress has denied."

In the same case the minority opinion recognizes the same principle in the following language (p. 36 of 86 L. Ed.):

> "Of course a denial of certiorari is not to be taken as a ruling on the merits of any question presented."

Conclusion.

Petitioner has heretofore (*ante* pp. 5-6, 14, 15) raised the question of "due process" under both the 5th and 14th Amendments as applied to the case at bar. The raising of the bar of a judgment or decree with respect to an unpleaded and undecided issue, in a case where the party against whom the judgment is decreed is asserted as defense was not an indispensable party either *per se* or by

representation, is obviously a denial of due process. As to the notes in suit, petitioner has not had its day in court.

Hurtado v. *California,* 110 U. S. 516, 4 S. Ct., 111; 28 L. Ed. 232.

Murray v. *Hoboken Land, etc. Co.,* 18 How. 272; 15 L. Ed. 372.

The decision of the Supreme Court of Delaware is violative of the 14th Amendment. The Judicial Department of the Federal Government is, in turn, governed in the exercise of its function by the rule of due process in the 5th Amendment.

Hovey v. *Elliott,* 167 U. S. 409; 17 S. Ct. 841; 42 L. Ed. 215.

It is respectfully submitted that this case is one calling for the exercise by this Court of its discretionary jurisdiction in order that the aforesaid manifest error may be corrected and petitioner accorded due process in the litigation of its just claims. To this end, a writ of certiorari should be granted in order that this Court may review the decision of the Supreme Court of Delaware and reverse the same.

JAMES R. MORFORD,
Attorney for Petitioner.

MARVEL AND MORFORD,
Of Counsel.

FILED
OCT 6 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942

No. 403

PHOENIX FINANCE CORPORATION,
a corporation of the State of Delaware,
Petitioner,

-vs-

IOWA-WISCONSIN BRIDGE COMPANY,
a corporation of the State of Delaware,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

RESPONDENT'S BRIEF

DANIEL F. WOLCOTT,
FRED A. ONTJES,
WM. C. GREEN,
Counsel for Respondent.

Southerland, Berl & Potter,
Geo. Gray Thouron,
Of Counsel.

FORBE PRINTING, INC., MANKATO, MINN.

INDEX

SUBJECT INDEX

Opinions 1-2
Jurisdiction 2-3
Statement Of The Case 3-5
The Facts 5-6
The Original Bill In the Federal Court 6-12
Appointment Of Receiver 12
Intervention 12-13
Phoenix Finance Corporation Made A Party To Subsequent Pleadings 13-16
Appointment Of And Proceedings Before Master 16-23
Report Of Master 23-25
Exceptions To Master's Report 26-33
Opinions Of Court, Findings Of Fact And Decree 33-38
Motions Of Phoenix And Trustees To Vacate Decree, For Dismissal, For Rehearing And For Modification 38-42
Order Of Court On Motions Of Trustees And Phoenix 42-45
Appeal To the Eighth Circuit Court Of Appeals 45-51
Summary Of Argument 51-54
Argument 54-108

I—The Federal Courts in the Original Suit, the Judgment in Which Was Pleaded as Res Adjudicata in This Case, Having Decided the Question Of Diversity Jurisdiction as a Contested Issue, Those Decisions Became Res Adjudicata, and Could Not Again Be Inquired Into. 54-61

II—The Federal Court Had Full And Complete Jurisdiction 61-79

(a) The Deed of Trust and Bonds in Controversy and the Underlying Considerations Therefor Were Inseparable 61

(b) The Trustees Were the Only In-

dispensable Parties Complainant 62
(c) The joining of Petitioner Did not Oust Jurisdiction 69
(d) The District Court Acquired Complete Jurisdiction When the Receiver Took Possession 72
(e) The Cases Cited by Petition Are Not In Point 73
(f) The Iowa Decisional Law is not As Claimed by Petition 75

II—Petitioner Was Fully Represented By The Trustees In The Foreclosure Cause.... 79-88

III—The Federal Courts Had Full And Complete Jurisdiction To Determine The Matters Involved In This Cause. They Were Fully Within The Issues And Were Controverted And Litigated In The Federal Cause 89
(a) As Stated by the Supreme Court of Delaware the Question of the Consideration of the Notes in Suit as Consideration for the Bonds Were Fully Within the Issues in the Foreclosure Case 89
(b) Courts Are Not Limited to the Pleadings and the Decree in Order to Determine the Issues of a Former Case and the Effect of the Adjudication Thereof 89
(c) Doctrine of Res Judicata Does Not Depend Upon Affirmance and Denial of a Particular Proposition in the Pleadings of the Former Suit, But on the Fact That the Proposition Has Been Fully and Finally Investigated and Tried 91
(d) The Rule of the National Courts and of the Courts of Iowa as to What Constitutes Res Judicata are the

Same 92
IV—The Notes In Suit Were Determined In the Federal Case Not to Constitute a Pre-Existing Debt Supporting The Bonds For the Security of Which the Mortgage Was Given 98
V—Successful Defense To Action On Collateral Bars an Action on the Debt 103
Conclusion 108

TABLE OF CASES CITED

Alabama Power Company vs. Ickes 302 U. S. 464 4
Allen-West Commission Co. v. Brashear (C. C. E. D. Ark) 176 F. 119, 121 67
American Express Co. vs. Mullins 212 U. S. 311, 29 S. Ct. 381 97
Anderson v. Watt 138 US. 694, 704, 705 80
Armour & Company vs. Miller 8 (CCA) 91 Fed. 87
Bacon v. Rives, 106 U. S. 99 70
Bagley vs. Bates, 223 Iowa 836, 273 N. W..... 93
Baltimore Ship Co. v. Phillips. 274 U. S. 316 92
Barney v. Latham 103 U. S. 205, 215; Ex-parte Nebraska, 209 U. S. 436, 444 69
Beals vs. Ill. M. & T. R. R. Co., 133 U. S 29.... 64-65
Beloit v. Morgan, 7 Wall. 619, 19 L ed. 205.... 106
Bennet Savings Bank v. Smith 171 Iowa 405, 408 67
Blytheville L. & A. S. R. Co., v. St. Louis 70
Bonnafee v. Williams, 3 How. 574 70
Brainerd vs. Buck, 184 U. S. 99 4
Bullard v. Cisco, 290 U. S. 179 66
Carpenter vs. Longan, 16 Wall. 271 62-104
Cella v. Brown (C. C. A. S.) 144 F. 742, Cer. den. 202 U. S. 620 72
Central Appalachian Co. v. Buchanan (CCA 6th) 90 Fed. 454 98
Central National Bank vs. Bateman & Companies, Inc., 15 Del. Ch. 31, 31 All. 202 85
Central Trust Company of N. Y. vs. Calif. S. N. R. Co. 110 Fed. 70 88
Central Union Trust Co. v. Anderson County Texas, 268 U. S. 93 73
Chicago Life Ins. Co. vs. Cherry, 244 U. S. 25.... 73
Chicat County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 378 93
Coal Co. v. Blatchford, 11 Wall. 172 60

Erratum: Index page IV. Insert between fourth and fifth lines from bottom Chew vs. Brumagen 13 Wall. 497, 20 L. ed. 663 105

Construction Co. v. Cane Creek, 155 U. S. 283 70
Continental Equitable Title & Trust Co. 84-85
Cooper vs. Reynolds, 10 Wall. 308, 316, 77 U. S. 97
Corsican National Bank vs. Johnson, 251 U. S. 68, 40 Ct. 82 101
Davis v. Brown, 94 U. S. 423 93
Deaton vs. Hollingshead, 225 Iowa 967, 282 N. W. 87
Dodge v. Tulleys, 144 U. S. 451 66
Dowell vs. Applegate, 152 U. S. 327, 340 60
Dunn vs. Lumbermen's Credit Ass'n. 209 U. S. 20 4
Egyptian Novaculite Co. v. Stevenson (C. C. A. 8 F. (2d) 576, 579 72
Elwell vs. Fosdick, 134 U. S. 500 64
Equity Rule 10 May 4, 1925, 28 U. S. C. A. 83
Equity Trust Co. v. Denney 24 F. (2d) 169 (C. C. A.) 7th Circuit 70
Federal Land Bank of Omaha vs. Jefferson 229 Iowa 79
Fidelity-Philadelphia T. Company v. Hale & Kilburn Corp. 83
First Trust & Savings Bank et el., vs. Iowa Wisconsin Bridge Company et al., (8CCA) 98 Fed. 86
Fletcher Cyc of Corp. (Perm. Ed.) Vol 1, Sec. 198 100
Fransham v. Tow Bros., 196 Iowa 1082, 196 N. W. 71 67
Fulsom vs. Quaker Oil & Gas Co., (8CCA) 35 Fed. (2d) 80
Geddes vs. Anaconda Copper Co., 254 U. S. 590 101
Georgetown vs. Alexandria Canal Co., 12 et 91, 9L 86
Guaranty Trust Co. v. Chicago, M. & St. P. Ry Co., 15F (2d) 434, 440 (D.C.N.O. Ill) 66
Hamer v. N. Y. Ry. Co., 244 U. S. 266 66

Hardenberg v. Ray, 151 U S. 112 71
Hartford Ins. Co. vs. Southern Pacific Co., 227 U. S. 207, 47 85
Haynes v. Lewis, 21 Wis. 663 67
Hickey vs. Johnson (8CCA) 9 Fed. (2) 96
Hoskins vs. Hotel Randolph Co., 206 Iowa 932 211 N. W. 423 79
Indianapolis vs. Chase National Bank, 62 S. Ct. 15, 86L ed. 27 73
Iowa Tile & Loan Co. v. Clark Bros. et al, 213 Iowa 875, 237 N. W. 336 76-77
Irving Trust Co. v. Deutsch (CCA) 73 Fed. (2) 100
Jackson v. Smith, 254 U. S. 586, 41 S. Ct..... 100
Johnson v. Forstall, et al., 3 La. Ann 466.... 104
Sykes v. Gerber, 98 Penn. 104
Kenyan v. Wilson, The Same v. Baker, 78 Iowa 106
Kerrison vs. Stewart, 3 Otto 155 63
King City, Mo., for use and benefit of United States Cast Iron Pipe and Foundry Co., v. Southern Surety Co. 91
Korrison, Assiyne v. Stewart, 93 U. S. 195.... 70
Krippendorf v. Hyde, 110 U. S. 276 73
Lane vs. Equitable Trust Company of New York, Nov. 24, 1919, (8CCA) 262 Fed. 918 Cert. 82-84
Loeb v. Columbia Township Trustees, 179 U. S. 472, 481 90
Lovejoy v. Murray, 3 Wall. 1, 70 U. S. 1, 19 80
Louisville and Nashville Ry. Co. v. A. L. Schmidt, 177 U. S. 230 65
Manson vs. Duncanson, 166 U. S. 533 65-97
Marcel v. Engebretson (CCA. 8) 74F. (2d) 93 73
Maryland v. Baldwin, 112 U. S. 490 70
Mercantile Trust Co., vs. Schlofly (CCA8) 299 F. 202 64
Mexican Central Ry. Co., v. Eckman, 187 U. S. 429 66

Miller v. Mahaffy, 45 Iowa 289 76
Millie Mining Co. v. McKennie, (6CCA) 90
Milwaukee Trust Co. v. Van Valkenburgh, (132 Wis. 638) 112 N. W. 1083 67
Mollan v. Lorrance, 9 Wheat 537 71
Morgan's Co. v. Texas Central Ry., 137 U. S. 171, 201; 73
McArthur v. Scott, 113 U. S. 343, 396 70
McCandless v. Furland, 296 U. S. 140, 56 S. Ct. 100
McKay vs. Randolph Coal Company (8CCA) 82-84
McNutt v. Williams, 3 How. 574 70
McPherson v. Commercial Building & Securities Co., 206 Iowa 562, 218 N. W. 306 78-85
National etc. Co., v. Oconto, 183 U. S. 216 90
Palmer v. Bankers & Trust Co., (CCA 8) 12 F. (2d) 747, 752 66
Palmer vs. Texas, 212 U. S. 118 73
Phelps vs. Oakes, 117 U. S. 236 71
Plumb v. Crane, Adm'r. etc., supra. 123 U. S 560 80-107
Rand v. Walker, 117 U. S. 340, 344 70
Reynolds v. Lyon County, 121 Iowa 733, 96 N. W. 91
Reynolds, et al v. Stockton, 140 U. S. 254 89
Rew v. School District, 125 Iowa 28, 98 N. W. 802 94
Richter vs. Jerome, 123 U. S. 233, 246 65,66
Robbins v. Chicago City, 4 Wall. 657, 71 U. 657 80
Roche vs. McDonald, 275 U. S. 499, 48 S. Ct. 142 97
Roller vs. Murray, 234 U. S. 738, 34 S. Ct. Rep. 902 3
Root vs. Woolworth, 150 U. S. 401, 414, 14, S. Ct. 97
Sampson v. Jump, 188 Iowa 528, 175 N. W. 90
Salem Trust Company v. Manufacturers' Finance Co. et al., 264 U. S. 182 70-75
Schroeder v. State Bank, 144 Iowa 42 80-107

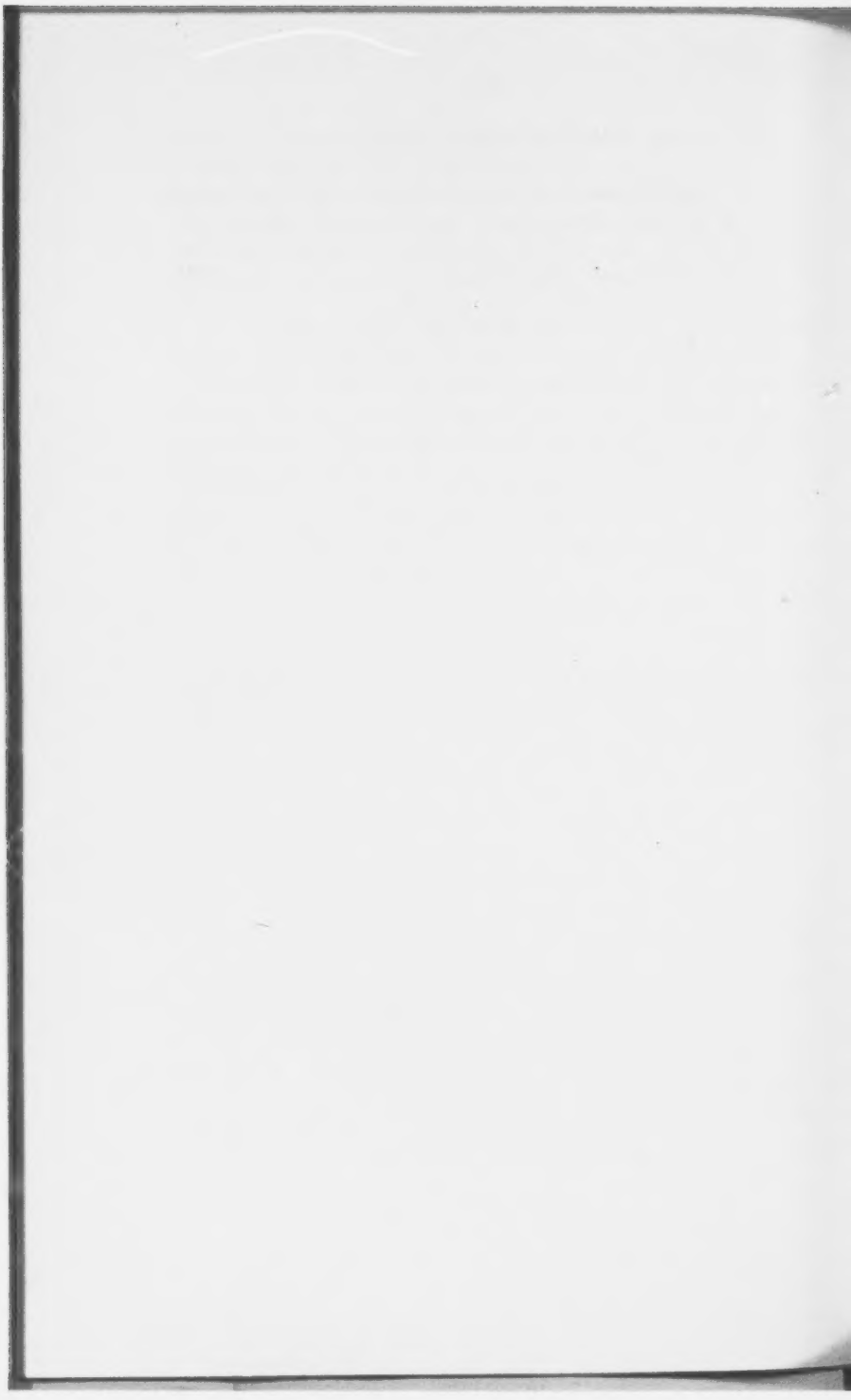
Scott v. Armstrong, Section 10, 968 Iowa Code 1935 quoted supra 85
Sioux City Terminal Ry. and Warehouse Co. v. Trust Co. of North America (C.C.A. 8) 824 F. 124 aff. 173 U. S. 99 72
Souffront v. La Compagnie Des Sucreries etc. 217 U. S. 495, 54 L. ed. 80-107
Smith v. Bell (CCA 8) 217 F. 243 66
Speers Sand and Clay Works, Inc., vs. American Clay Works, 20 Fed (2) 333 88
State of Oklahoma v. State of Texas, 256 U. S 90
Stewart v. Dunham, 115 U. S. 61 70-72
Stoddard v. Thompson et al., 31 Iowa 80 Ct. p. 82, ... 79-107
Stoll vs. Gottlieb, 305 U. S. 165, 172 58
Supreme Tribe of Ben Hur vs. Cauble et al., 255 U. S. 356, 41 S. Ct. Rep 338 72
Thomas vs. Brownsville Ry. Co., 109 U. S. 85-87
Thompson v. Roberts Bros., 65 U. S. 14, 16 L Ed. 107
Thornton vs. Carter (8CCA) 109 Fed. (2) 316 97
Toledo Scale Co. vs. Computing Scale Co., 261 U. S. 399, 43 S. Ct. 458 61
Toucey vs. New York Life Ins. Co. (8CCA) 102 Fed 86
Tucker v. Silver, 9 Iowa 261 67
Vose v. Bronson, 73 U. S. 452, 456 66
U. S. v. California & Oregon Land Co., 192 U. S. 355, 24 S. Ct. 266 106
Walden v. Skinner 101 U. S. 577 70
Werlein v. New Orleans, 177 U. S. 390, 397. 20S Ct. 682 93
White River Lumber Co. vs. State of Ark., 279 U. S. 692, 700 2
Wieland v. Pioneer Irrigation Co. (CCA 8) 238 F. 519 aff. 259 U. S. 498 72
Wilson v. Oswego Township, 151 U. S. 56..... 70
Wood, et al., v. Davis, 18 How. 367 70

TEXT BOOKS CITED

34 C. J. p. 853 104
34 C. J. p. 901, Sec. 1311 97
49 C. J. p. 310, Sec. 380 98
57 C. J. p. 389, Sec. 40 97
34 Corpus Juris, Sec. 1329, p. 921 90
Freeman on Judgments (5th Ed.), Vol. 1, Sec. 430, p. 936 107
Freeman on Judgments (5th Ed.), Vol. 1, Sec. 430, p. 638 107
Freeman on Judgments (5th Ed.), Vol. 2, Sec. 772, p., 1642 90
Jones on Mortgafes, 8th Ed., Sec. 316, at p. 289 103
Thompson on Corp., Vol 3, Sec. 2289 102

STATUTES CITED

Constitution of the United States, 5th Amendment 2-3
Constitution of the United States, 14th Amendment 2-3
Judicial Code Sec. 337 (b), 28 U.S.C.A. Sec. 344 (b) 2
Federal Equity Rules Nos. 37 and 39 . . . 66-85
Section 10, 968 Iowa Code 1927, 1935 and 1939 77-78-85
Equity Rule 10 as amended, 28 U.S.C.A. following section 723 83



IN THE

Supreme Court of the United States

October Term, 1942

No. 403

PHOENIX FINANCE CORPORATION,
a corporation of the State of Delaware,

Petitioner

vs.

IOWA-WISCONSIN BRIDGE COMPANY,
a corporation of the State of Delaware,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the Supreme Court of Delaware is reported in 25A. (2d) 383. The Superior Court's opinion appears in 14A. (2d) 386; 40 Del. 500.

Opinions in the federal Foreclosure Cause are as follows: District Court, 19 F. Supp. 127; affirmed

Circuit Court of Appeals, 8th Circuit, 98 F. (2d) 416; Certiorari Denied U. S. Supreme Court, 305 U. S. 650, 676.

In a later proceeding supplemental and ancillary to the decree in the Foreclosure Cause an opinion of the District Court appears in 32 F. Supp. 277; opinion of affirmance in the Circuit Court of Appeals, 8th Circuit, 115 F. (2d) 1; certiorari granted U. S. Supreme Court, 312 U. S. 670, 61 S. Ct. 550, 85 L. Ed. 1112; reversed on a point not here involved, 62 S. Ct. 139; 86 L. Ed. 107; Adv. Ops. 16 and 19 October Term, 1941.

JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. Sec. 344 (b)).

Petitioner claims there is involved a question of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States. This claim is denied by respondent for the reasons following:

(a) That the record does not furnish any basis for such claim.

(b) This question is not shown to have been presented to the court below.

White River Lumber Co. vs. State of Arkansas 279 U. S. 692, 700.

Rule 12 Par. 1.

(c) The cases cited by petitioner on page 5 of its petition with respect to this contention are not in point, in that all those cases involved situations where the party sought to be bound by a former judgment was not a party, personally or by representation, or in privity with a party, in the case wherein the former judgment was rendered.

(d) Petitioner's claim of want of due process under the Fifth and Fourteenth Amendment to the Constitution was a matter for it to assert in the original case in the Federal Court and if its claim was there denied its remedy was to appeal to the Circuit Court of Appeals and ask a reversal on that ground, and if its appeal was denied, to petition this Court for certiorari on the same ground. It could not attack the decree collaterally on that ground when it was invoked against it in the Delaware Courts, nor can it thus collaterally attack such decree before this Court.

Roller vs. Murray 234 U. S. 738, 34 S. Ct. Rep. 902.

STATEMENT OF THE CASE.

Petitioner's statement (pages 7-13 of its petition) referred to in its Brief in Support at page 24, disregards the fact statement of the case made by the Delaware Supreme Court and is so inaccurate and incomplete that it is necessary for respondent to

submit a statement of the case.

The United States District Court for the Northern District of Iowa in the ancillary injunction case (32 Fed. Supp. 277) held that the matters here involved were previously adjudicated. This was affirmed by the Circuit Court of Appeals for the Eighth Circuit. (115 F. (2) 1) The Delaware Supreme Court also found that the matters here involved were previously adjudicated and that petitioner was bound by such adjudication. (R. 131-144, reported 25 A. (2) 383). *1

This Court has repeatedly held that the concurrent decisions of two courts upon a question of fact will be followed unless clearly shown to have been erroneous.

Brainard vs. Buck 184 U. S. 99

Dunn vs. Lumbermen's Credit Ass'n. 209 U. S. 20

Alabama Power Company vs. Ickes 302 U. S. 464.

However petitioner's assertions, it is necessary for us to make the following statement.

---

*1 Wherever reference is made to the record in the Delaware Courts the letter "R." will be used in the reference, and where reference is made to Exhibits 4 the record in the United States District Court for the Northern District of Iowa, and in the United States Circuit Court of Appeals for the Eighth Circuit, the letters "F. R." will be used in the reference.

This is an action brought by petitioner based on two alleged promissiory notes of respondent,

on two alleged promissory notes of respondent, one dated December 15, 1932, due June 15, 1933 for $2,000.... and one dated January 20, 1933, due July 20, 1933, for $3,125.00, both alleged to be for value received by appellant and claim for interest on said alleged notes (R. pp. 4 to 11).

Defense *res adjudicata* and want of consideration as part thereof (R. pp. 13 and 29 and pp. 90 to 91).

The trial court rendered judgment in favor of petitioner. (R. 17) On writ of error to the Supreme Court of Delaware the judgment was reversed. (Decree R. 144-145; Opinion R. 131-144)

THE FACTS.

Jury was waived and trial was had to the court. Petitioner offered in evidence said notes, exhibits numbers three and four, which were received in evidence (R. pp. 30 to 32).

Respondent offered in evidence defendant's Exhibit 4, certified and exemplified record of the United States District Court for the Northern District of Iowa in the case of First Trust & Savings Bank and A. H. Schubert, as trustees, and Phoenix Finance Corporation, complainants, vs. Iowa-Wisconsin Bridge Company a corporation, defendant, and Fayette D. Kendrick, et al., interveners, and in connection with the offer asked that said proceedings of the United States District Court for the Northern District of Iowa be given full faith and credit under

Section 1, Article 4 of the Constitution of the United States and under Section 905 of the United States Revised Statutes (R. pp. 34 to 35, and 52), which was received in evidence.

Respondent also offered in evidence opinion of the United States Circuit Court of Appeals for the Eighth Circuit as contained in 98 Fed. (2) beginning at page 14, and certified copy thereof, defendants' Exhibit 1, and defendants' Exhibit 2, order of affirmance and defendants' Exhibit 3, mandate of the Circuit Court of Appeals, which were received in evidence (R. pp. 40 to 42 and 51), and offered in evidence defendants' Exhibit 5, transcript on original trial before the master in the Federal Court, not set forth in the record before this Court because already set forth in narrative form in exhibit 4. (Stipulation R. 148).

THE ORIGINAL BILL IN THE FEDERAL COURT.

The original bill in this case was filed by the First Trust & Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, a resident of Wisconsin, as trustees, versus Iowa-Wisconsin Bridge Company, a Delaware corporation, on or about August 28, 1933, for the foreclosure of an alleged $200,000 bond issue. The action was instituted at the request and instigation of petitioner Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection (F.R. p. 537); Exhibit 28, H.E.B. F.R. pp. 789 to

791; especially bottom p. 790; Exhibit B, H.E.B., F.R. bottom p. 794 and top p. 795; Exhibits B-1, B-2, B-3, B-4, B-5, B-6, B-7, H.E.B. F.R. pp. 1478 to 1482; Exhibits B-6, on stationery Phoenix Finance System. predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its predecessor (F.R. bottom p. 549).

The bill alleged jurisdiction based on diversity of citizenship, and alleged a deed of trust in the ordinary form of a mortgage trust deed securing a bond issue of $200,000.00, making it the duty of the bridge company to pay taxes on the mortgaged property (F.R. p. 31) to pay interest on the bonds, and to pay the bonds as they matured (F.R. p. 29). In case of default for a period of sixty (60) days, it was provided that the trustees "may," and upon the written request of the holders of twenty-five per cent of the bonds then in default "shall" declare the principal of all the bonds due (F.R. p. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this indenture by a suit or suits in equity or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustees * * * shall deem most effectual" (F.R. pp. 37-38) and in addition to Section 13 (F.R. pp. 43-44) of the mortgage or trust deed, quoted from in the opinion of this court (98 Fed. (2) 416 at 420), it also provided: "Section 10. The company covenants that (1) in case default shall be made in the payment of any in-

terest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be, with interest upon the over due principal and/or installments of interest of each such bond at the coupon rate, *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendancy of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof; and in case of a sale of the mortgaged property, and of

the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of any express trust, shall be entitled to enforce payment of and to receive the amount then remaining due and unpaid upon any and all bonds issued hereinunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment, by the trustees, and no lien of any execution upon property subject to the lien of this indenture, or upon any other property, shall in any manner or to any extent affect the lien of the trustees upon the trust property, or any part thereof, or any rights, power or remedies of the trustees or of the holders of the bonds hereby secured; but such lien, rights, powers and remedies shall continue unimpaired as before" (F.R. pp. 41-44). Emphasis supplied.)

The bill alleged that all of said bonds were duly made and executed on behalf of the company, duly presented to and authenticated by Bechtel Trust Company (trust company) as in said mortgage deed of trust provided, and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a *good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value.* Said bonds and interest coupons are valid obligations of said Iowa-Wisconsin Bridge Company, and are entitled to the benefit and secur-

ity of said mortgage deed of trust. The bill further alleged authority of the trustees to sue under the terms of the deed of trust, default and acceleration of due date, and prayed:

1. That an account may be taken of all property in the Northern District of Iowa subject to the lien of said mortgage deed of trust, and that said deed of trust may be decreed to be a valid first lien upon all and singular thereof.

2. That an account may be taken of the bonds and interest coupons secured by said mortgage deed of trust and the amount *due on the bonds* for principal and interest or otherwise, and the amounts expended or to be expended by your complainants, and that said Iowa-Wisconsin Bridge Company be decreed to pay to your complainants *the amount found to be due on such accounting* together with costs and expenditures in this proceeding and attorneys' fees by the court assessed, with a short day to be fixed by the court; * * *

3. * * *

4. That in the event the proceeds of such sale shall not be sufficient to satisfy in full the decree to be rendered in this suit that these complainants *have a decree* against said Iowa-Wisconsin Bridge Company *for the deficiency.*

5. For a receiver of all the property of the defendant.

6. For general equitable relief (F.R. pp. 10 to 11). (Emphasis supplied.)

An answer was filed on the part of the bridge company, which admitted diverse citizenship of the parties and admitted the issuance of certain bonds, but denied that said bonds were a valid and binding lien against the the real estate of the property of the defendant; denied that the complainant was entitled to the relief prayed for and denied every matter set out in the complaint not otherwise disposed of; admitted the execution of purported mortgage deed of trust but denied the validity thereof, and denied that the amount claimed on said bonds was actually due; alleged that a large part of the bonds were improperly executed and delivered; that the defendant did not have full and complete record of the issuance or transfer of said bonds nor the consideration received therefor; alleged the belief that there was a good defense to all or part of complainant's claim; alleged conflicting interests of common directors of the bridge company and Phoenix Finance System, Inc.; denied complainant's right to the appointment of a receiver, and prayed the court:

"To deny complainants the appointment of a receiver and to compel complainants to make a complete showing and accounting to this court of the method and manner in which bonds were sold and delivered, the consideration paid and received thereof and to compel complainants to show in what manner the bonds authenticated by the trustees were

disposed of * * * and to compel the complainants to make a complete showing as to the consideration received in each and every instance for the delivery of authenticated bonds," and prayed the protection of the court (F.R. pp. 62 to 66).

APPOINTMENT OF RECEIVER.

On Septemebr 28, 1933, the court appointed a receiver of all of the property of the bridge company of every kind and took the same into legal custody (F.R. pp. 68-72). The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action.

INTERVENTION.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company, and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated (F.R. pp. 73-83) praying that the complainant's bill be dismissed, the bonds cancelled and the the deed of trust set aside and for general equitable relief. He alleged that John A. Thompson and his associates, officers and directors of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., dominated the bridge company, and by the exercise of such domination, fraudulently procured the execution and delivery of the deed of trust and the issuance of the bonds to corporations controlled by them; that all of the bonds and mortgage deed of trust were issued as a part of the fraudulent

scheme, plan and conspiracy without consideration, with intent to cheat and defraud the bridge company and its stockholders out of their property; that in pursuance thereof part of the bonds issued were fraudulently obtained by cancelling stock and that the bonds and mortgage were fraudulent, without consideration, invalid and void; that none of the bonds had passed to innocent purchasers for value without notice; that said John A. Thompson and his associates in conspiracy still were in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant corporation would be unavailing (F.R. pp. 73-83; amendment to petition of intervention, F. R. pp. 100 to 102). On December 5, 1933, the court granted the intervention (F.R. pp. 85 to 86). The master and the court found that the bridge company was not making and would not have made a good faith defense to complainant's action had not the interveners intervened (F.R. pp. 160-183).

PHOENIX FINANCE CORPORATION MADE A PARTY TO SUBSEQUENT PLEADINGS.

The intervener made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. pp. 83-84, f. 119). The motion was granted. The court's order provided;

"The motion of Fayette D. Kendrick intervener to make additional parties plaintiff and defendant to the petition of intervention then came on for

hearing and complainant's counsel having stated in open court that the Phoenix Finance Corporation *has succeeded* the Phoenix Finance System, Inc., and is holder of the bonds involved in this action with the exception of about $10,000 worth of said bonds. It is hereby ordered and directed that the Phoenix Finance System, Inc., and the Phoenix Finance Corporation *be made parties plaintiff in this cause, and defendants to the petition of intervention* and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied.) (F.R. p. 86.)

Petition of intervention was ordered to stand as an answer on behalf of the bridge company to complainant's petition (F.R. p. 100).

On the 8th day of December, 1933, an amendment was filed to the answer by the bridge company, alleging that John A. Thompson and others associated with him dominated and controlled Phoenix Finance System Inc., and subsidiary or ancillary organizations and dominated and controlled the Iowa-Wisconsin Bridge Comany, and while acting for said corporations and controlling the Iowa-Wisconsin Bridge Company, and its board of directors as a part of the scheme fraudulently procured bonds of the Iowa-Wisconsin Bridge Company by cancellation of bridge company stock (F.R. pp. 67-68).

Subpoena directed to Phoenix Finance Corporation, making it a party, was duly served on said corporation (F.R. pp. 87-89, ff. 126-127). It

appeared (F.R. p. 89)

As stated by the Circuit Court of Appeals:

"Inasmuch as the District Court found that Phoenix Finance Corporation was in all respects, so far as concerns this case, the successor of Phoenix Finance System, Inc., and managed by the same officers, both corporations are hereinafter indiscriminately referred to as Phoenix" (98 Fed (2) 416 at 419).

On February 23, 1934, Phoenix Finance Corporation filed an answer to the petition of intervention on information and belief denying all the allegations thereof and alleging that it was the *owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosure. (Emphasis supplied.) (F.R. pp. 91-92.)

The trustees filed reply to the petition of intervention denying the allegations thereof, etc. (F.R. pp. 102-103).

Intervener Fayette D. Kendrick, filed a petition for production of books and papers of Phoenix Finance Corporation (F.R. pp. 92-96), which trustees resisted. (F.R. 96-97) and the court ordered produced, (F.R. 97-98), but were not produced. (F.R. 614-616; 396-399).

Other stockholders of the bridge company, residents of Iowa, intervened, and adopted the pleadings filed by Kendrick (F.R. pp. 106-107).

APPOINTMENT OF AND PROCEEDINGS BEFORE MASTER.

Counsel for the parties agreeing, the court appointed a special master and entered an order of reference, which provided:

"It is ordered that this cause be and it hereby is referred to Honorable J. W. Kindig, Special Master in Chancery, to hear all of the issues in this cause, to take the evidence and proofs according to law, to examine the questions in issue and to report from said evidence his findings of fact and conclusions of law in respect to all of the issues herein, *to report his conclusions as to whether the evidence and pleadings entitle complainants or the other parties herein to the relief or any part thereof, prayed for in their respective pleadings,* and to perform all such other lawful services as may be necessary or proper in the premises, etc." (F.R. p. 107, ff. 108 to 109 inc., folio 169,) (Emphasis supplied).

On the trial before the master the trustees appeared by attorneys selected by the Phoenix and the Phoenix appeared by attorney W. B. Sloan (F.R. p. 331; F.R. p. 553; f. 945).

The complainants, trustees, and Phoenix Finance Corporation to support the allegation contained in their bill of complaint:

"That all of said bonds were duly made and executed on behalf of the (Bridge) company. * * * and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued *for a good and valuable* consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value".

called John A. Thompson, president of complainant, Phoenix Finance Corporation, as a witness in their main case, who testified as to the claimed consideration for the bonds, and who was cross examined on the subject. (Direct examination, F.R. pp. 538-542; cross examination, F. R. pp. 542 to 545; cross examination on part of interveners, F.R. pp. 545-556; re-cross examination, F.R. pp. 560-561; further cross examination, F.R. pp.562-564; further cross examination on part of interveners, F. R. pp. 633-637; F.R. pp. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. pp. 675-678; cross examination on part of interveners, F. R. bottom pp. 666-685; F. R. pp. 691-692).

The claimed considerations involved in the case are summarized in the decision of the Circuit Court of Appeals, 98 Fed. (2) 416 at 424, (F.R. 1700-1701) as follows, to-wit:

"The consideration claimed by appellants to have

been paid by the parties to whom the bonds were issued may be summarized as follows:

To Phoenix in consideration of			
1. In exchange for its mortgage dated March 10, 1931,			
Principal of mortgage	$50,000.00		
Accrued interest	3,548.56		
Allowance to give 8% yield on bonds	12,727.31		
			$ 66,275.87
2. For advancements under guaranty contract of November 10, 1930,			
To Industrial Contracting Co.	10,000.00		
To McClintic - Marshall Co.	11,262.71		
			21,262.71
3. Paid Kramer & Hogg to discharge mechanic's lien			9,000.00
4. Cash			461.42
5. In Exchange for 517 shares of bridge company stock with accrued interest			60,500.00
6. As security for Payment of taxes	3,125.00		
Advancements	14,610.19		
		17,735.19	20,100.00

To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	$15,000.00	$200,000.00

"It will be observed that of the total issue $22,400 of bonds were issued as security or in payment of claims against the bridge company by claimants other than Phoenix for obligations aggregating $15,000, and the remainder of the bonds in the sum of $177,600 were issued to Phoenix. The court and the master found that the $15,000 of claims were meritorious, and the decree provided for their payment by the receiver.

"The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix" (98 Fed. (2) 416, at 424). (F. R. 1700-1701)

The complainants by the testimony of their witness, John A. Thompson, president of the Phoenix Finance Corporation, claimed consideration for the bonds, as shown in the above summary. As to items 1, 2, 3, and 4 of said summary, see Thompson testimony on part of complainants (F.R. 541) and the minutes referred to in said testimony appearing in Exhibit 6 (H.L.B.) were offered in evidence by complainants (F.R. 980-981; F. R. 539; and Thompson testimony, F.R. 562-563 and Exhibit A-2 H.E.B. p. 843).

As to item 5 of said summary see Thompson's testimony on part of complainants (F.R. 541). As to item 6 of said summary as claimed consideration, (which includes the items here involved) see said Thompson testimony. (F.R. pp. 542 and 562-563 and Exhibit A-2 H.E.B. F.R. 843-844 and Exhibit B-28 H.E.B. F.R. 829 and F.R. 986.)

The alleged cause of action in the present case is based upon two promissory notes, one for $2000 dated December 15, 1932, and one for $3,125.00 dated January 20, 1933. The record in the foreclosure suit shows that the $2000 note was a part of the sum of $14,610.19 designated as "advances" in item 6 of the foregoing summary, and that the $3,125.00 note is the same as the first entry of item 6 referred to as "payment for taxes." For the total alleged indebtedness under item 6 in the amount of $17,735.19 bonds in the sum of $20,100 were issued to Phoenix.

As witness for complainants in their main case said John A. Thompson testified: "Then $20,100 in principal amount of bonds, being all of the remaining bonds, was issued as collateral to notes for funds borrowed from Phoenix Finance Corporation. The amount is seventeen thousand and odd dollars" (F.R. 542). Said Thompson prepared a memorandum, Exhibit A-2 (H.E.B.), and with respect thereto testified: "However, the memorandum shows that $20,100 face value of 'B' bonds are in the possession of Phoenix, having been deposited as collateral by the bridge company to notes issued by the bridge

company for borrowed money in the total principal sum of $17,735.19. The numbers of the Series B bonds aggregating $20,100 so held to secure the notes are as follows:

B-106 to 111, inclusive,	$100 each,	Total	600.00
B-119, 121-129 "	500 each,	"	5,000.00
B-130, 132-139 "	500 each,	"	4,500.00
B-131, B-132 "	5000 each,	"	10,000.00
	Total aggregate		20,100.00"

(F.R. pp. 562-563 and 844.)

On the 17th day of July, 1933, the Thompson-Phoenix controlled board of the bridge company passed a resolution that $20,100 of Class B bonds of the bridge company be pledged as collateral to a note of $12,110.19 to Phoenix and three other notes in the amount of $5,625 to Phoenix (the latter notes being one of $500; one of $3,125 and one of $2,000). (F.R. pp. 1028 and 1029, Ex. No. 28 H.E.B. shows issuance of collateral of said bonds to said notes, F.R. p. 829.)

The last three entries of item six of the foregoing summary relate to bonds held by others than Phoenix. (F.R. 542 and 842 and 844 and 827 and 829 and 986.)

A large amount of testimony and exhibits were offered in evidence to show the control by Thompson

and Phoenix of the Iowa-Wisconsin Bridge Company, and that the bonds were without consideration. This appears from the five volumes of record. Written briefs and arguments were filed (F.R. p. 693). The case was finally orally argued before the master on October 25, 1935, and submitted in its entirety (F.R. p. 694). Complainants' counsel in such oral argument stated:

"Mr. Fowler: There is a question in this case as to whether or not at this particular time the master should recommend that a decree of foreclosure be entered, and the question of which of the bonds are to participate be reserved or taken up at a later date. I don't suggest for a minute that this testimony will have to be reopened. It is whether we want to go at this in two parts. In other words, it is our contention that if any of these bonds are valid, then the foreclosure must be ordered. Then the next question is which of the bonds must participate. * * *

"As I have said in our opening argument, I think under this record you can use your own judgment, the master can use his own judgment as to whether he wants to decide this all at this time or whether he wishes to make a recommendation to the court ordering a foreclosure of the mortgage, the determination of which bonds shall participate to be taken up at a later recommendation."

To this Mr. Ontjes, representing the interveners, said:

"Mr. Fowler talks about piece-meal trials. Your Honor, we didn't enter into this trial as any piece-meal proposition. We had no piece-meal ideas in our mind when Mr. Green and I presented our citation in this matter for the taking of these depositions and this evidence. It is our contention that we are trying and submitting this case in its entirety at this time and if Your Honor feels, as we believe in this matter, that this mortgage and bond issue is fraudulent, then she flies out the window. There is no evidence here of any kind that anybody is an innocent holder of any of the bonds. Not a one. The record before you is that substantially, if not wholly, they are original payees of the bonds.

'Mr. Fowler: We represent all the bondholders" (F.R. pp. 644-695).

REPORT OF MASTER.

The master filed his report on March 10, 1936. The master found that John A. Thompson above named before the issuance of the said bonds and before the authorization of the said trust deed came into control and management of the defendant bridge company and that at all times during the times material the said John A. Thompson controlled the Phoenix Finance System, Inc. and other affiliated companies (F.R. 129 and 135).

As to the first four items of bonds in the above summary amounting to $97,000.00, he found them to

have been issued without consideration and to have fraudulent and void.

As to item five of the bonds in the above summary, the master found they were fraudulently obtained by the exchange and cancellation of 517 shares of the bridge company stock (F.R. p. 130). As to item six in the above summary of $20,100 of bonds, the master found that they were without consideration except as to $3,125.00 (F.R. pp. 133-134).

The master found as to the specific bonds which were collateral for the notes above mentioned involved in this Delaware suit (Finding 10):

"(i) That the remaining bonds, approximating $19,000 to $20,000 were issued to the Phoenix Finance Corporation as a security for a note of $3,125.00 given in part to secure the payment of that amount made by the said Phoenix Corporation on behalf of the bridge comany to pay taxes of the bridge company in the State of Wisconsin. That to the extent of the principal of, and interest on, the said note only the said bonds are valid, but to no other extent are these particular bonds valid."

"(k) That of the bonds above named issued to Phoenix Finance Corporation to secure the said note of $3,125.00 the amount of bonds not necessary for such security, approximating the sum of $16,975

are without consideration, obtained by a fraud and invalid" (F.R. p. 133 to p. 134).

The master in his conclusions of law stated:

"Paragraph 5. That under the facts above found, it is apparent as a matter of law that the complainants did not furnish the necessary proof in sustaining the validity of the bonds, except the bonds specifically named in paragraph 10 of the findings of fact, and the prima facie showing made in the first instance by the complainants has been overcome by evidence of the defendant and interveners excepting as to those bonds especially named as having consideration in paragraph 10 of the findings of fact, and all the said bonds not named in said paragraph 10 of the findings of fact as having a consideration are illegal and void because they were issued fraudulently."

"Paragraph 6. That excluding the said bonds specifically mentioned in paragraph 10 of the findings of fact as having consideration, approximately $112,375 of the balance of said bonds issued to the said Thompson and his companies, not in exchange for stock but on a fraudulently alleged consideration purporting to appear on the books of the Iowa-Wisconsin Bridge Company were issued without legal consideration and are therefore void" (F.R. p. 136).

EXCEPTIONS TO MASTER'S REPORT.

The Iowa-Wisconsin Bridge Company and interveners filed exceptions to the master's report as to said $9,000 and $3,125 issued to Phoenix Finance Corporation and as to foreclosure and as to assessment of partial costs. (F.R. pp. 150-155, particularly folio 224, 225 and 226.)

The interveners and defendant filed exceptions to the master's report (F.R. p. 148) exception 8 being:

"To so much of the fifth conclusion of law as makes the following exception to such conclusion, to-wit 'excet the bonds specifically named in paragraph 10 of the findings of fact' and to the seventh conclusion of law as makes exception in said par-such conclusion and to so much of the eleventh cnclusion of law as makes exception in said paragraph to said conclusions, as follows to-wit: 'Exception as hereinafter stated' and 'exception that the bonds named in paragraph 10 in the findings of fact as having been issued in good faith are valid and may be enforced accordingly.' " (F.R. p. 153 to and including p. 155 and 224 to 226.)

Exception No. 8 and intervener's exceptions 9 and 11 were sustained by the court in its final decree (F.R. p. 203).

The trustees, by counsel of Phoenix' selection, filed exceptions to the master's report (F.R. supp. trans. of record, pp. 3-14) asserting that said $97,000

of bonds were issued for good and valuable consideration (F.R. p. 12); and asserting that said $60,500 of bonds were issued for good and valuable consideration (F.R. p. 13); and that said $20,100 of bonds were issued for good and valuable consideration (F. R. p. 13).

And with reference to said $20,100 of bonds asserted in said exceptions—

"That Series B, Bonds, Numbers 106-111 inc., 119, 121-130, inc., in the aggregate principal amount of $20,100, were issued for a good and valuable consideration and that upon presentment the holders thereof are entitled to share ratably in the proceeds of the sale of the mortgaged property to the full extent thereof, subject only to the condition that the holders thereof shall not be entitled to receive in excess of the amount of their primary debt, $17,735.19, and interest. (See Exception No. 5; Des Moines Testimony, page 84, Exhibit A-2.)" (F.R. Supp. p. 13.)

Phoenix Finance Corporation appearing by W. B. Sloan and by additional counsel, filed full and complete voluminous exceptions to the master's report, claiming basic considerations for all of the bonds held by the Phoenix, re-defining with particularity the issues involved (F.R. Supp. pp. 14-58).

Phoenix in its exception number 5 asserted that $97,000 of bonds represented by the first four items in the above summary were issued and delivered to

it for valid consideration, stating "which valid consideration was the following;" then setting forth a tabulation, claiming the same consideration for said bonds as shown in the first four items of the above summary, as claimed by Phoenix (F.R. Supp. pp. 26 and 27).

In said exception five Phoenix claimed consideration for the $50,000 mortgage held fraudulent and without consideration by the master and the court (F.R. Supp. p. 27; F.R. p. 131; pp. 191-192) and claimed as consideration for said bonds items to Industrial Contracting Co. $10,000 and McClintic Marshall Co. $11,262.71, which the bridge company never owed (court's findings 32, 33, 34, 40, F.R. pp. 194-196 and 201-202) and other items which the court found the bridge company did not owe (F.R. bottom 177-178). Phoenix in its exception number four undertook to assert that the said $60,500 of bonds, item number five, in the above summary, were not procured fraudulently by cancellation of the 517 shares of stock, but were based on consideration (F.R. Supp. 23-26). The court found that this stock was cancelled when Phoenix Finance Corporation fraudulently obtained the bonds and that it was not entitled to have it reissued (F.R. p. 413).

And Phoenix with particularity excepted in its exception number six (F.R. Supp. 48) to the master's report with respect to the notes now in issue in the present case, asserting that the aforesaid $20,100 of bonds had basic consideration, stating in said exception the following, to-wit:

"EXCEPTION NO. 6.

"It excepts to fact finding 10 (i) and (k), (Master's Report, pages 23 and 24) wherein the master refers to bonds of $19,000 to $20,000 and finds them to be a valid pledge for principal and interest on a note of $3,125.00 from the bridge company to Phoenix Finance Corporation, but invalid to the extent of $16,975.00 as without consideration and fraudulent."

"This finding is erroneous for the following reasons:

I.

"This pledge of $20,100.00 of Series B bonds was made by the bridge company to secure its four promissory notes to Phoenix Finance Cororation. (Minutes, Exhibit 31, page 402, and intervener's chart, Exhibit B28). The existence of these four notes, aggregating $17,735.19 principal amount, is without dispute in the record. The notes are as follows:

"(a) Note for $2,900.00 dated 12-15-1932, due 6-15-1933, at 8%, represents cash borrowed and deposited to credit of bridge company in Iowa-Des Moines National Bank & Trust Company. (See bridge company journal, Exhibit 1, page 107, line 16, and bridge company ledger, Exhibit 2, notes payable account.)

"(b) Note for $500.00, dated 12-31-1932, due 6-31-1933, at 8%, to apply on account of cash loaned to bridge company both by direct transfer of cash and payment of bridge company debts by Phoenix Finance Corporation. (See same journal, page 110, lines 5 to 7, and same ledger, notes payable account.)

"(c) Note for $3,125.00, dated 1-20-1933, due 7-20-1933, at 8%, representing cash loaned and deposited by bridge company in Iowa-Des Moines National Bank & Trust Company. (See same journal, page 114, lines 30 and 31, and same ledger, notes payable account.)

"(d) Note for $12,110.19, dated 7-7-1933, due on demand at 8%, representing cash loaned to bridge company by direct transfer of cash and payment of bridge company debts by Phoenix Finance Corporation. (See same journal, page 130, lines 1-12, and same ledger, notes payable account.)

"The execution and consideration for these four notes are corroborated and explained by bridge company minutes hereinafter referred to and by testimony of John A. Thompson, namely Thompson's Des Moines testimony, page 84, lines 16-21, as follows:

" 'Then $20,100, being all of the remaining bonds, were issued as collateral to notes of the Phoenix Finance Corporation. These notes were for funds borrowed from Phoenix, the amount owing is $17,000 and some odd cents, and $12,000 note and some

smaller notes.' (Also see Thompson's Des Moines testimony, page 90, line 10, to page 93, line 13, and pages 228, lines 7 to 25, and Exhibit A-2)"

It will be noted that in the foregoing exception number six Phoenix not only asserted the notes as claimed original underlying consideration of said unclaimed original underlying consideration of said notes as consideration for the issuance of the bonds. The notes described in paragraphs (a) and (c) of said exception quoted above are the same as those involved in this present action. This was admitted in the present action in the Superior Court (R. 54-56).

Petitioner states in its petition (page 12): "There was no finding of fact either of the master or the trial court referrable directly or indirectly to the $2,000 note in suit." Such assertion is not supported by the record, as shown by Phoenix' said exception number six, which continues:

"The master makes no reference to note herein designated (a) for $2,000.00, but disallows it without stated reason or reference, as being without consideration and fraudulent. The master clearly erred because this was a plain loan of cash by Phoenix Finance Corporation to the bridge company and the money was deposited in the bridge company account in the Iowa-Des Moines National Bank & Trust Company. (Emphasis supplied.) (Citing exhibits)

3.

"The master makes no reference to notes herein designated (b) and (d) (the $500 note and the $12,-110.19 note referred to in Finding 7-c *infra) but without stated reason or reference disallows them both as without consideration and fraudulent. These notes grow out of the same source and are analyzed together.* (Emphasis supplied.) From late 1931 to the middle of 1933, being a period long after the bridge was built, the bridge company was in dire need of money. Phoenix Finance Corporation loaned the bridge company cash both by direct transfer of money which was deposited by the bridge company in its bank account and also by Phoenix Finance Corporation paying debts and liabilities of the bridge company.

4.

"The master correctly allowed note (c) for $3,-125.00 which was cash loaned to the bridge company and by it deposited in the bank and used to pay taxes in Wisconsin, but incorrectly found that this collateral pledge of bonds was valid only to the amount of the principal and interest of said note. He should have held the entire pledge of bonds valid until the obligation secured thereby was paid in full.

5.

"The indebtedness for which these four notes was given could not be held fraudulent on this record

and the master erred in so finding. It was incurred long after the bridge was built and under full knowledge and authorization of the bridge company directory board composed of directors who were concededly not 'Thompson men or associates.'

6.

"The debt evidenced by these four notes was incurred by a directory board against which there is not a breath of suspicion. It represents cash—borrowed by the bridge company—in a time of need —when it couldn't borrow elsewhere. The four notes ought to be allowed in full, with interest thereon, and this $20,100 pledge of bonds should be held valid until the debt is fully paid" (F.R. Supp. pp. 48-52).

OPINION OF COURT, FINDINGS OF FACT AND DECREE.

The trial court, after hearing the various exceptions, rendered its opinion, findings of fact and final decree (F.R. 156-204) holding that all of the bonds held by the Phoenix were issued without consideration and as a part of a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders out of their property (F.R. pp. 156-179).

The court in its opinion said:

"Phoenix Corporation's exception No. 6 chal-

lenges the master's findings of fact No. 10" (F.R. pp. 164-165).

"Defendants and interveners' exception to such conception challanges so much of the master's fifth conclusion of law as makes the following exception to such conclusion: 'Except the bonds specifically named in paragraph 10 of the findings of fact;' and to so much of the master's eleventh conclusion of law as makes exception to such conclusion, because the record does not warrant the exceptions" (F.R. pp. 165-166).

With reference to these exceptions the court said:

"This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that insofar as the language of the master's conclusion includes $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,-125.00 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. *What I have said with respect to the legal status of the Phoenix Finance Corporation as the successors of Phoenix Finance System, Inc., places it completely upon the level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did. and with full notice that its predecessor had at the outset taken 140 shares of stock of the bridge company without paying any subscription price therefor and has not accounted for it"* (F.R. pp. 177-178). (Emphasis supplied)

"In view of the conclusion of the court, a decree should be entered overruling the exception of plaintiff trustees, numbered one to eight, inclusive, and of Phoenix Finance Corporation, numbered one to six, inclusive, and exceptions reserved to the respective plaintiffs * * * and sustain defendant and interveners' exceptions numbered eight, nine and eleven with exceptions reserved to the plaintiffs" (F.R. p. 178).

The findings of fact of the court appear on pages 179 to 202, inclusive, of the first record.

The court first takes up the findings of the master, and approves only those portions of findings 10 (i) and (k) which find that bonds approximating $19,000 or $20,000 were without consideration, obtained by fraud and invalid. The court disapproved the finding of the master that $3,125.00 of the bonds had consideration and were valid (F.R. 179).

In addition to approving the findings of the master, the court made a number of additional findings, the most pertinent of which are the following:

"8. That Phoenix Finance Corporation, complainant, and defendant to petition in intervention, is the successor in interest of Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System, Inc., was at any time subject (F.R. p. 185).

"9. That this action was instituted by the plaintiffs herein as trustees upon the demand of Phoenix

Finance Corporation, as owners and holders of $177,600 of the $200,000 of the bonds involved herein.

"That said Phoenix Finance Corporation, referred to, agreed to secure and indemnify said trustees against all costs, expenses and liabilities incurred by them in taking the action demanded; and also designated the attorneys to be employed by the trustees and agreed to save the trustees harmless on account of any claim by said attorneys for fees and expenses in connection with the litigation" (F.R. pp. 185-186).

"John A. Thompson was interested in and with his wife, M. K. Thompson, and associates, A. B. Wilder and Emory H. English, controlled the Phoenix Finance System, Inc., and other affiliated companies. Thompson & Company was a wholly owned subsidiary of the Phoenix Finance System, Inc. M. White was John A. Thompson's secretary and an officer of Phoenix Finance System, Inc.

"In October and November, 1930, through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became president of and acquired control of the bridge company. At about the same time, the number of directors of the bridge company was increased and Thompson, together with other directors of the Phoenix Finance System, Inc., became directors of the bridge company. From that time on, Thompson controlled the bridge company" (F.R. 188).

The court found that said Thompson and his affiliated companies controlling the bridge company so manipulated its books as to cause false entries to be made thereon, as to make it appear that sums were received and paid out, which were neither received by nor paid out for the bridge company. (See court's finding No. 8, F. R. 181; and finding No. 26, F. R. 191-192, and finding No. 29, F.R. 193-194, and finding No. 40, F.R. 201-202; court's opinion F.R. bottom page 176 and top page 177.)

By its findings numbers 27, 28, 29, 30 and 41 the court found that as a result of various fraudulent transactions Phoenix had become indebted to the bridge company in amounts which aggregate $26,085.85, $14,000 thereof being for stock of the bridge company, which the Phoenix received and disposed of without payment therefor to the bridge company (F.R. pp. 192-194, both inclusive; F.R. 202). The court in its finding number 41 found:

"That the Phoenix Finance Corporation, at the time it was organized, was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor." F.R. 202; also see on the same subject court's opinion F. R. p. 176.)

The court found that $15,000 in bonds held by individual parties other than the Phoenix had consideration and in its decree made provision for them (F.R. p. 204).

The court in its decree specifically overruled the exceptions of plaintiff trustees numbered 1 to 8, inclusive, and of Phoenix Finance Corporation numbered 1 to 6, inclusive, and sustained defendants' and interveners' exceptions numbers 8, 9 and 11 and decreed "that the mortgage and bonds in suit were fraudulently issued; that all bonds are without consideration, with the exception of bonds aggregating $15,000 hereinafter specified. That the bill of the plaintiff be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000 of bonds" (F.R. p. 204).

MOTIONS OF PHOENIX AND TRUSTEES TO VACATE DECREE, FOR DISMISSAL, FOR REHEARING AND FOR MODIFICATION

On the 19th day of December, 1937, Phoenix Finance Corporation filed a motion to vacate, and expunge and set aside the decree, findings of fact, opinion, etc., on the claimed ground of want of jurisdiction (F. R. pp. 204-205), to which motion the bridge company filed a resistance (F.R. pp. 206-208). The motion was overruled (Supp. opinion of the court, F.R. pp. 208-211).

On January 29, 1937, the trustees by counsel of Phoenix' selection filed a motion for dismissal and in the alternative petition for rehearing, division one claiming want of jurisdiction as claimed in Phoenix Finance Corporation's prior motion, and asking dismissal; division two in the alternative petition for rehearing, *adopting the petition for rehearing of the Phoenix Finance Corporation, verified by John A. Thompson, president of Phoenix Finance Corporation* (F.R. pp. 211-214).

On the 29th day of January, 1937, Phoenix Finance Corporation by W. B. Sloan and other counsel filed petition for rehearing and in the alternative for modification of decree (F.R. pp. 216-391) alleging that a misunderstanding occurred between the master and counsel in taking of the testimony as to the scope of the questions and issues which were on trial and the method of trial procedure which was to be followed; that the only question properly to be considered was in reference to the validity of the mortgage deed of trust and right of foreclosure thereunder and that the question of the validity of any of the bonds would be determined after the determination of the question of foreclosure. That counsel did not introduce additional evidence on their behalf showing consideration for and validity of the bonds, but assumed that such matters would be taken up at a subsequent time, and the Phoenix attached thereto the affidavits of claimed witnesses with respect thereto, including the affidavit of John A. Thompson, who testified on the trial with respect to the claimed considerations, Phoenix in said petition

again claiming that the notes mentioned furnished a consideration for said $20,100 of bonds (F.R. 216-223). Paragraph 12 of the petition (F.R. pp. 219-220) refers to a number of affidavits attached to the petition and states:

"The ultimate facts which can and will be proved on this point are that the bridge company knowingly procured large amounts of cash and full and fair consideration for the bonds now held by the Phoenix Corporation."

The petition for rehearing refers to an affidavit of M. K. Thompson, wife of John A. Thompson, in which the aforesaid notes and *claimed underlying considerations* thereof are again set forth as claimed consideration for the bonds (F.R. pp. 325-326). And the petition refers to affidavits by L. J. Skoner and W. S. Gault, by which it is again asserted that the notes in question and the claimed underlying consideration thereof furnished consideration for said $20,100 of bonds (Gault F.R. p. 278; Skoner F.R. pp. 308-319, 315-319, 323). No allegation of diligence or that any evidence was newly discovered was contained in the petition.

The petition prayed:

"First: That a rehearing be granted herein and that it be given leave to present the new evidence aforesaid. * * *

"Fourth. *In case rehearing is denied, that the decree be modified so as to withhold from adjudica-*

tion the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received."

Petition verified by John A. Thompson, president *of Phoenix Finance Corporation (F.R. pp. 206-223 and 224-391).*

On the 18th day of February, 1937, the bridge company and interveners filed answer to the petition for rehearing and modification of decree supported by affidavits, alleging among other things, that this cause was pending for about two years before the hearing before the master, during which time numerous depositions were taken with respect to the fraudulent issue of the bonds and want of consideration of such bonds, and the fraudulent character of the deed of trust, which depositions were all on file six months or more before the trial and hearing before the master commenced, and that complainants were at all times fully advised that all of the issues were involved in the hearing and had ample opportunity to present any and all evidence on their part that they deemed to have foundation or to be relevant, pertinent or material; that there was not a single affidavit presented in support of the petitions nor was it claimed that any of the facts stated in the affidavits constituted newly discovered evidence that the whole mass of affidavits filed in support of the motions constituted mere repetition and accumulation of evidence taken at the trial and contained in the record, or at least evidence which could have been offered if

complainants had so desired (F.R. pp. 494-498). * * * That John A. Thompson was presented as a witness and examined on direct examination by complainants and cross examined, and further examined on direct examination by complainants as to the validity of the bonds; that the whole field of the alleged considerations of the bonds was covered in the depositions taken preparatory to trial and in the evidence taken at the trial in detail; that it was at all times contended by the interveners that all of the issues were on trial before the master—the question of the validity of the bonds and the want of consideration and the invalidity of the deed of trust (F.R. p. 405). And the answer further otherwise fully answered all of the claims of the petition for rehearing and modification of decree. (F.R. pp. 394-410; also see John A Thompson deposition taken prior to trial, F.R. pp. 414-500.)

ORDER OF COURT ON MOTIONS OF TRUSTEES AND PHOENIX.

On the 18th day of February, 1937, the motion of Phoenix and the trustees to vacate the decree for want of jurisdiction and petitions for rehearing were heard and on the 4th day of March, 1937, the court filed its order and opinion, denying said motion and petitions (F.R. pp 411-413). The court in its opinion stated:

"The petition for rehearing, filed by Phoenix Finance Corporation and adopted by the plaintiff trus-

tees, rests upon the claim that the master to whom the cause was referred in its entirety, received the submission under a misapprehension, and that the plaintiffs had also been of impression that they were to take further testimony at some future time when they submitted their bonds to the master or to the court. They further contend that the cause in behalf of the trustees and the Phoenix Finance Corporation was mismanaged by their counsel, and that now, having taken in new blood at the bar, the present counsel should be given a chance to try the case over.

"Having in mind the analogy of petitions for rehearing in equity cases and motions for new trial in law causes, the court is unable to find any substantial merit in any of the claims for a rehearing. The defense interposed to the plaintiffs' cause of action was that the bond issue and mortgage securing the same were all a part of a deliberate fraudulent scheme to obtain possession and ownership of the bridge after its completion and freeze out all of the stockholders. This scheme, as alleged and as proven, dated back to the inception of a certain $50,000 mortgage, and proceeded forward including the plans and their execution for the issuing of the bonds and mortgaging of the bridge. During all of this time the Phoenix Finance System, Incorporated, and its successor, Phoenix Finance Corporation, and the bridge company had interlocking directorates. The so-called Thompson interests predominated in all of them. As the master pointed out in his forth conclusion of law, in the circumstances with the charge

of fraud and conspiracy made, the burden was on the plaintiffs who had brought the suit at the instance of the Phoenix corporations, to show clean hands and fair dealing. This the plaintiffs not only failed to do, but throughout combatted the interveners who were permitted to defend in behalf of the bridge company. The interveners obtained an order of court for the production of the books and records of the Phoenix Finance Corporation before the master, but Phoenix Finance Corporation vigorously and successfully, it appears, prevented the production of those books and records, and its officer when on the stand before the master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuance of certain shares of stock to Phoenix Finance Corporation, which it canceled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another, and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the court to restore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Corporation. On the other hand I think the petitions for rehearing should be denied and the motion

to dismiss and vacate the decree overruled, and it will be so ordered" (F.R. pp. 412-413).

APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS.

The trustees and the Phoenix Finance Corporation appealed from the opinion, findings of fact and final decree and from the court's ruling on motions to vacate the decree and the court's ruling on petition for rehearing and modification of decree to the Eighth Circuit Court of Appeals, appearing by new counsel, Lon O. Hocker and Vincent L. Boisaubin of the firm of Jones, Hocker, Gladney & Grand of St. Louis, Missouri. The trustees filed assignments of error and the complainant, Phoenix Finance Corporation, filed assignments of error (F.R. 501-528).

The assignments of error, both of the trustees complainants and of the Phoenix Finance Corporation complainant, assigned error on substantially every ruling and finding of the court. In both assignments it was again urged that the $20,100 of bonds were given to secure four notes aforesaid ($2,000.00, $3,125.00, $500.00, $12,110.19) of the bridge company aggregating $17,735.19, and were collateral for loans and advancements, and that the court erred in holding that they were without consideration. (Trustees' assignments 9, 12, 14 and 19 F. R. 505-506; Phoenix' assignments 14, 15, 47, 49, 55 F.R. pp. 511-512, F.R. 524-525-526.)

Both the assignments of the trustees and Phoenix

on the opinion of the court holding that the master erred in holding that the $9,000 of bonds and $3,125 of bonds in the hands of the Phoenix were valid and that the court erred in failing and refusing to sustain the validity of the bonds to the extent of the two amounts aforesaid in the hands of Phoenix (F. R. 505 and pp. 524 and 525). Both the trustees' complainants and Phoenix' complainants assignments of error also assigned claimed errors based on the court's decree, each assigning among others, the following:

Trustees' assignments:

"14.

"The court *erred in adjudging and decreeing* that all bonds are without valid consideration with the exception of the following bonds, aggregating $15,000. * * *

"19.

"The court erred in failing to adjudge and decree that all of the bonds issued to the Phoenix Finance Corporation, totaling $20,100, as collateral for loans and advances were valid" (F.R. 505-506).

Phoenix' assignments:

"49.

"The court erred in *adjudging and decreeing,* with the exception of bonds aggregating $15,000, that all bonds are without valid consideration."

"51.

"The court erred in decreeing that the bonds issued to Phoenix Finance Corporation were without consideration, and erred in failing to include in its decree that, even if the bonds, as such, were invalid for any such reason, the decree should be without prejudice to the right of Phoenix Finance Corporation to institute an action at law against the bridge company for money had and received for advances of money claimed to have been made for the use and benefit of the bridge company, provided said action be brought within such time as the court deemed to be fair and just."

"52.

"The court erred in its decree which denied the prayer of the bill, except in so far as the decree provides for the protection of the holders of said $15,000 in bonds."

"53.

* * *

"55.

"The court erred in failing to adjudge and decree that all of the $20,100 of bonds issued to the Phoenix Finance Corporation as collateral for loans and advances were valid" (F. R. 525-526).

Both the trustees' complainant assignments and Phoenix' complainant assignments of error assigned claimed error in the court's ruling on their petition for rehearing or modification of decree (F.R. 507 and 528-529).

The record shows without dispute that the four notes, $2000.00, $3,125.00, $500.00 and $12,110.19, respectively, and the purported indebtedness which they represented were specifically passed upon. The notes were referred to in the minutes of Thompson-Phoenix-controlled directors, purporting to authorize the issuance of the $20,100 of bonds (F.R. pp. 1028-1029), the $2000 note was referred to in the minutes in the figure $5,625.00, which it clearly appears from exception number 6 consisted of the $2000 note, the $500 note and the $3,125 note. In the testimony of the witness, John A. Thompson (F.R. p. 563) he states: "However, the memorandum shows that the $20,100 face value of B bonds were in the possession of Phoenix, having been deposited as collateral by the bridge company to notes issued by the bridge company for borrowed money in the total sum of $17,735.19." The four notes making up this amount are shown on the notes payable account of the bridge company ledger entitled "Phoenix Finance System, Inc." (F.R. p. 1103), which is referred to in Phoenix' exception number 6 quoted *supra,* and the $2000 note dated December 15, 1932, the $500 note dated December 31, 1932, the $3,125.00 note dated January 20, 1933, the $12,110.19 note dated July 7, 1933, were specifically set out in the affidavit of Mrs. M. K. Thompson, wife of John A. Thompson (F.R. pp.

325-326), and the claimed underlying indebtedness checks for $2,000 and $3,125 at page 325, while a purported copy of the checks is attached to affidavit of Lee J. Skoner (F.R. pp. 315 and 319).

Moreover, the exact relationship of the $2000 note, the $500 note, the $3,125 note and the $12,-110.19 note; the $17,735.19 total and the $20,100 of bonds, is shown on the statement, Exhibit B-28, H.E.B. (F.R. p. 829) which was before the master (F.R. p. 562).

There can be no question from a reading of the record as to the inclusion of the $2000 note, the $3,125 note, the $500 note and the $12,110.19 note and the claimed indebtedness which they purport to represent in the findings of the master, of the United States District Court and of the Eighth Circuit Court of Appeals. The latter court in its decision said:

"The last $20,100 of bonds were issued to Phoenix as collateral to secure a purported indebtedness of $17,735.19. The master disallowed all but $3,125 which was used to pay taxes. This is a just claim, but is more than offset by the $14,000 and other items referred to above. $9,806.10 of the amount were furnished by Phoenix to pay interest on bonds held by Phoenix, which were known by the officers of Phoenix to be fraudulent. The transaction amounts to no more than a manipulation to obtain more bonds and increase the secured claim against the bridge company. $1505.75 were charged for sal-

aries to Phoenix officers and employees. We find no argument of appellants in defense of this item. The remainder of the claim is for cash items alleged to have been advanced by Phoenix to the bridge company, which, if allowable, are wiped out by the indebtedness of Phoenix to the bridge company." 98 Fed. (2) 416, at 426. (F.R. 1704-1705).

The Phoenix Finance Corporation, complainant, filed petition for writ of certiorari in the Supreme Court of the United States, which was denied. (Reported *Phoenix Finance Corporation, Petitioner v. Iowa-Wisconsin Bridge Company, et al.*, No. 438. Oct. Term, 1938; 305 U. S. 650, 59 S. Ct. Rep. 243.) Petition for rehearing denied. (305 U. S. 676, 59 S. Ct. Rep. 356.)

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit to the District Court of the United States for the Northern District of Iowa was duly issued and filed in the office of the clerk of the latter court on the 5th day of April, 1939 (R. 128).

The present case on the two notes, one of $2000 and one of $3,125 is simply an attempt to re-litigate matters determined by the federal courts. Those notes and the claimed indebtedness which they purport to represent were directly put forward as the considerations for bonds involved in the federal case.

It was admitted on the trial of the present case in the Superior Court that the notes sued on in this

action are two of the notes set forth in Phoenix' exception number six to the master's report (R. 54-56; F. R. Supp. 48-49).

SUMMARY OF ARGUMENT

The Federal Court in the original suit, the judgment in which was pleaded as res adjudicata in this case as a contested issue decided the question of its jurisdiction based on diversity of citizenship and determined that the making of petitioner Phoenix a party co-complainant did not oust the jurisdiction of the court and that federal jurisdiction existed to determine the entire controversy. That an appeal was taken from such determination to the Eighth Circuit Court of Appeals and the same affirmed, and certiorari denied by this Court, and that such determination of jurisdiction is res adjudicata, and could not be attacked collaterally, as attempted in the instant case, when the judgments and decrees of the federal courts were offered in bar in this case. The federal courts have the power to determine their own jurisdiction based on diversity of citizenship, which determination may be appealed from to the Circuit Court of Appeals and brought by writ of certiorari to this Court, but when such determination has been made as a contested issue it cannot be attacked collaterally in another suit between the same parties when the judgment is offered in bar as res adjudicata.

The Federal Court had full and complete jurisdiction. The bonds and their underlying considera-

tions and the deed of trust were inseparably involved in one controversy; the trustees were the only indispensable parties complainant. The trustees filed the original bill and thereafter prosecuted the action at all times diligently. Prior to the filing of the petition of intervention the bill and answer of the defendant had been filed and receiver had been appointed of all of the bridge company's property of every description and the same was in the legal custody of the court and the court then had full, complete and exculsive jurisdiction of the subject matter and of the parties. The joining thereafter of petitioner Phoenix as a party co-complainant did not oust jurisdiction. The court had acquired complete jurisdiction prior thereto when the receiver took possession. The petitioner Phoenix was fully represented by the trustees. The joining of Phoenix as a party co-complainant was merely ancillary.

The cases cited by petitioner are not in point.

Petitioner was fully represented by the trustees in the foreclosure cause. The trustees under the deed of trust were fully empowered to bring any action either at law or in equity for the recovery of the claimed pre-existing indebtedness, for the security of which the mortgage deed of trust was given.

One who prosecutes or defends an action in the name of another to establish or protect its own right or to assist in the prosecution or defense of an action in aid of some interest of his own is bound by the judgment rendered therein.

The federal courts had full and complete jurisdiction to determine the matters involved in this cause. They were fully within the issues and were controverted and litigated in the federal cause. As stated by the Supreme Court of Delaware the question of the consideration of the notes in suit as considerations for the bonds were fully within the issues in the foreclosure case.

Courts are not limited to pleadings and the decree in order to determine the issues of a former case and the effect of the adjudication thereof. What was determined in a former case is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court.

The doctrine of res adjudicata does not depend upon affirmance and denial of a particular proposition in the pleadings of the former suit but on the fact that the proposition has been fully and finally adjudicated and tried.

The rule of the federal courts and of the courts of Iowa as to what constitutes res adjudicata are the same. Petitioner's assertion that it was necessary that there be a pleading of counterclaim or set-off in the federal case is without merit since that is only a collateral attack on the judgment and decree of the federal court and a matter which could only be claimed on direct appeal from such judgment on an assignment of error. Phoenix made such an assign-

ment of error in its appeal to the Circuit Court of Appeals and the assignment was overruled and that is res adjudicata.

The notes in suit were determined in the federal case not to constitute a pre-existing debt supporting the bonds for the security of which the mortgage was given.

A successful defense to an action on collateral bars an action on the claimed indebtedness.

ARGUMENT

1.

The Federal Courts in the original suit the judgment in which was pleaded as res adjudicata in this case, having decided the question of diversity jurisdiction as a contested issue, those decisions became res adjudicata and could not again be inquired into.

Petitioner's first ground of argument is that the District Court in the foreclosure cause was without jurisdiction under Article IIII Section 2 of the Federal Constitution to render an adjudication against Phoenix with respect to the $3125.00 and $2000.00 notes asserted as a consideration for bonds.

The bill of foreclosure was filed on October 28, 1933 by a citizen of Iowa and a citizen of Wisconsin, trustees, as complainants, against the respondent, a citizen of the State of Delaware. The bill alleged

jurisdiction based on diversity of citizenship. (F.R. 2) On the same day the trustees moved for the appointment of a receiver. (F.R. 60) On August 25, 1933 respondent bridge company filed an answer. (F.R. 60-66) On September 28, 1933 the court appointed a receiver of all the property of the bridge company of every kind and took the same into legal custody. (F.R. 68-72) The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action. On December 5, by leave of court a citizen of Minnesota intervened on behalf of respondent and all other stockholders similarly situated. (F.R. 78-83) The court ordered that the petition of intervention stand as an answer on behalf of respondent bridge company. (F.R. 100)

After the filing of the petition of intervention and on December 5, 1933 Phoenix Finance Corporation, petitioner here as successor of Phoenix Finance System, Inc., and as a holder of all bonds involved in the action, with the exception of about $10,000.00 worth was by order made a party plaintiff in the cause and defendant to the petition of intervention. (F.R. 87-89) On February 23, 1934 petitioner filed an answer to the petition of intervention, alleging among other things, that it was the owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company issued in accordance with the mortgage declared on in the bill of foreclosure. (F.R. 91-92) The trustees filed a more complete reply to petition of intervention as amended. (F.R. 101-103) After the court filed its opinion, findings of fact and decree on December 1st, 1936 petitioner Phoenix Fi-

nance Corporation on December 19, 1936 moved the court to vacate and set aside its decree, findings and all of its orders on the ground that the jurisdiction of the court depended upon diversity of citizenship; that petitioner and respondent were adverse parties and were both citizens of Delaware and and that therefore no diversity of citizenship existed upon which jurisdiction in the suit was based. (F.R. 204-205) A resistance to this motion was filed by respondent bridge company and interveners. (F.R. 206-208)

Petitioner's motion was denied. (See opinion and order F.R. 208-211) A similar motion was filed bp the trustees (F.R. 215-216) which was overruled. (F.R. 411)

An appeal was taken to the Circuit Court of Appeals by the trustees and by petitioner F.R. 501-502). in which trustees and petitioner assigned the court's rulings on diversity jurisdiction as error. (F.R. 502, 503, 508, 509)

The Circuit Court of Appeals specifically passed on the question of jurisdiction stating: "The District Court acquired complete jurisdiction over the mortgaged property when the suit was commenced and the receiver took possession. (Citing) At that time before Phoenix became a party there was complete diversity of citizenship. Had Phoenix not become a party the court could have proceeded to final judgment, granting or denying foreclosure. It could have decided every issue, including the validity of

the trust deed and the amount of the debts secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record. (Citing) * * Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceedings, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. (Citing) The court did not err in overruling appellants' attack on the jurisdiction." (F.R. 1694; 98 Fed. (2) 416 at 421)

Petitioner Phoenix then petitioned this Court for writ of certiorari. The first ground on petition for certiorari was that the Circuit Court of Appeals had exceeded its constitutional jurisdiction in pronouncing judgment on the merits of a controversy between citizens of the same state. (Petition for writ of certiorari No. 438 October Term 1938 page 2, *Phoenix Finance Corporation, Petitioner vs. Iowa-Wisconsin Bridge Company, et al.,* Respondents) The question of jurisdiction was fully argued in its brief in support of the petition. (S. C. pp. 16-22) Respondent in its brief on this petition fully responded to the argument of petitioner. (Respondent's brief S. C. pp. 16-19) This Court having denied certiorari (305 U. S. 650), a petition for rehearing was filed, in which the contention of petitioner as to jurisdiction was reasserted. (Petition for rehearing S. C. pp. 2-6) The

petition for rehearing was denied. (305 U. S. 676)

It therefore appears conclusively that the claim of petitioner of lack of jurisdiction in the federal courts was fully contested and decided by the District Court and the Circuit Court of Appeals and fully contested before this Court on application for writ of certiorari.

It has been settled by this Court that after a federal court has decided the question of the jurisdiction over the parties as a contested issue the court in which the plea of res adjudicata is made has not the power to inquire again into that jurisdictional fact. *Stoll vs. Gottlieb* 305 U. S. 165, 172.

This Court in that case said:

> "We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, would have jurisdiction of the subject matter of the litigation. * * * After a party has his day in court with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely re-tries the issue previously determined. * * * That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation has been determined by this court in Forsyth vs. Hammond.

> * * * There are quasi-jurisdictional facts, diversity of citizenship, majority of litigants and jurisdiction of parties, a mere finding of which, regardless of actual existence is sufficient."

The Court finally held that since the question of jurisdiction over the subject matter was raised and determined adversely to respondent that determination was res adjudicata of that issue whether or not power to deal with the particular subject matter was strictly or quasijurisdictional.

A case cited by this Court in *Stoll vs. Gottlieb*, supra, where the answer to the plea of res adjudicata was that a diversity of citizenship had not existed in the first case is *Des Moines Navigation and Railroad Company vs. Iowa Homestead Company*. 123 US. 552. A suit having been brought by the Homestead Company in the state court to recover certain taxes which were the subject of litigation between the same parties in an earlier case in a federal court in which the decision had been adverse to the Homestead Company, when the Navigation Company pleaded the earlier decree in bar to the later action the reply was made that the Courts of the United States which had rendered the earlier decree had no jurisdiction of the suit and no legal power or authority to render the decree or judgment. The basis of the assertion was that the earlier suit had been originally instituted by the Homestead Company, an Iowa corporation, against various non-resident defendants and the Navigation Company, also an Iowa corporation, and removed to the Federal Court, in which all defendants including the Naviga-

tion Company appeared, filed answers and defended, and that citizens of the same state being opposed to each other, the adjudication was void for want of jurisdiction. The court said:

> "Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called upon to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizen of Iowa and the citizens of New York, its final decree in the suit could have been reversed or appealed, if erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that court was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this Court on appeal after the Circuit Court entertained the suit, and this Court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was at the time of the trial of the present case in the court below a valid and subsisting prior adjudication of the matter in controversy, binding on these parties and a bar to this action."

See also

Dowell vs. Applegate 152 U. S. 327, 340

Chicago Life Ins. Co. vs. Cherry, 244 U. S. 25.

Petitioner is now seeking to have re-heard what was determined on its petition for certiorari in the federal case in 1938. The Circuit Court of Appeals rendered its decree in that case on August 11, 1938 and this Court denied certiorari December 5, 1938 and rehearing January 3, 1939 and the three months' time alloted for the filing of a petition for certiorari for such purpose has long since expired and jurisdiction for the consideration thereof ended.

Toledo Scale Co. vs. Computing Scale Co. 261 U. S. 399, 43 S. Ct. 458.

II.

THE FEDERAL COURT HAD FULL AND COMPLETE JURISDICTION

Petitioner in order to support its claim on the question of jurisdiction now advances the argument that as to the issue of mortgage foreclosure there was undisputed jurisdiction because of the diversity of citizenship between the trustee complainants and the respondent, but that as to the issues relating to the validity and consideration of the bonds and their underlying considerations federal jurisdiction never existed from the beginning. (Petitioner's Brief in Support p. 31).

(a) *The deed of trust and bonds in controversy and the underlying considerations therefor were inseparable.*

The bill asked (1) determination of the amount due on the bonds and coupons, (2) a short day to pay, and (3) then strict foreclosure without redemption and deficiency judgment.

The bonds and their underlying considerations and

deed of trust were inseparably involved in one controversy. As stated in *Carpenter vs. Longan* 16 Wall. 271:

> "Upon bill of foreclosure * * * account must be taken to ascertain the amount due upon the instrument secured by the mortgage * * * The note and mortgage are inseparable; the former as essential the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

The bonds were all covered by one and the same purported mortgage deed of trust. Fraud in the inception and want of consideration were charged as to all of the bonds and the mortgage. That constituted the basis of one inseparable alleged cause of action and controversy. And that was the controversy of which the Federal Court had jurisdiction from the very beginning.

(b) *The trustees were the only indispensable parties complainant.*

The mortgage deed of trust provided that the trustees upon request of one-fourth in amount of the bonds in case of default upon being indemnified to their satisfaction, "shall proceed to protect and enforce their rights and the rights of the bondholders under this indenture by suit or suits in equity or at law, by foreclosure or any other appropriate remedy," and "that no holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or at law, for the foreclosure of this indenture or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy here-

under" except in case the trustees after notice and demand refuse to act. (R. 37, 38, 43)

On request of Phoenix Finance Corporation the trustees filed the original bill, and in said bill, and thereafter, appeared by counsel selected by Phoenix Finance Corporation and prosecuted the action at all times diligently. (F.R. 1478-1482, 790, 791, 794, 11)

Prior to the filing of petition of intervention the bill and answer of the defendant had been filed and a receiver had been appointed of all the bridge company's property of every description, and the same was in legal custody of the court. (F.R. 160-162, 166, 68-72)

If this suit, instead of being a suit by trustees to foreclosure the trust deed had been a suit by the bridge company or its stockholders representing the corporation to set aside the trust deed and bonds, the only necessary and indispensable parties to the suit would have been the trustees.

In the case of *Kerrison vs. Stewart,* 3 Otto 155, it was held:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger *to enforce or declare void the trust.*" (Italics ours)

The Court said:

> "In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party * * * The principle which underlies this has always been applied in proceedings relating to railway mortgages,

> where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessity of that class of cases, but an old one, long in use in analogous circumstances and found to be well adapted to the protection of the rights of those interested in such securities."

In *Mercantile Trust Co. vs. Schlafly* (C.C.A. 8) 299 F. 202, which was a suit by a trustee in bankruptcy against a trustee under a mortgage securing bonds to recover money collected by defendant for interest on bonds within four months prior to bankruptcy, and not disbursed to the bondholders, it was claimed that the bondholders were necessary parties. The Court held that they were not; that they were all represented by the trustee.

In *Beals vs. Ill. M. & T. R. R. Co.*, 133 U. S. 290, the Court said:

> "Upon the facts thus established no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, in which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage, made in the name of another company to secure payment of the bonds were made parties. *The bondholders were thus fully represented in that suit, and bound by the decree cancelling and annulling the bonds and mortgage.*" (Italics ours)

In *Elwell vs. Fosdick*, 134 U. S. 500, where a decree had been entered and a sale made and confirmed in a suit to foreclose a first mortgage on a railroad,

in which the trustee under second mortgage was made a party, and a release of errors in the proceedings executed by such trustee, the Court said:

> "The trustee represented the bondholders not only in the proceeding which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he bound them by his release of errors."

To the same effect see, *Manson vs. Duncanson,* 166 U. S. 533.

On the issues of fraud conspiracy, invalidity and want of consideration, Phoenix Finance Corporation, as well as the other bondholders, were represented by the trustees.

In the case of *Richter vs. Jerome,* 123 U. S. 233, 246 the Court said:

> "Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took the bonds; but as all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustees when its interests are not in conflict with theirs, all the equities now asserted were proper subjects for adjudication in the former suit, if they existed. They formed part and parcel of the security which was then foreclosed. * * *"

Also see,

Beals v. Ill. M. & T. R. Co., 123 U. S. 290.

A suit to foreclose a trust deed securing a bond issue must be brought in the name of the trustee,

and the fact that a beneficiary is a citizen of the same state as the grantor does not defeat the jurisdiction of the Federal Court if the trustee is a citizen of a different state. It is the trustee's citizenship that governs. The bondholders are not necessary parties to a suit brought by the trustee, and their citizenship is immaterial.

The trustees in the instant case, being trustees under a corporate mortgage or deed of trust securing the issue of bonds, were vested with express power to collect the debt and/or to enforce the security on default by foreclosure and sale and to apply the proceeds; were the only indispensable parties plaintiff in the suit to foreclose in the Federal Court, and it was not necessary that the bondholders be joined, since the trustees were not exceptionable and had not refused to execute the trust.

Federal Equity Rules Nos. 37 and 39;
Vose v. Bronson, 73 U. S. 452, 456;
Richter v. Jerome, 123 U. S. 233, 246;
Palmer v. Bankers & Trust Co. (C.C.A. 8), 12 F (2d) 747, 752;
Guaranty Trust Co. v. Chicago, M. & St. P. Ry. Co., 15 F. (2d) 434, 440 (D. C. N. D. Ill)
Smith v. Bell (C.C.A. 8) 217 F. 243;
Dodge v. Tulleys 144 U. S. 451;
Bullard v. Cisco, 290 U. S. 179;
Coal Co. v. Blatchford 11 Wall. 172;
Knapp v. Railroad Company, 20 Wall. 117;
Hamer v. N. Y. Ry. Co., 244 U. S. 266;
Mexican Central Ry. Co. v. Eckman, 187 U. S. 429;

Allen-West Commission Co. v. Brashear, (C.C. E.D. Ark.) 176 F. 119, 121.

The Circuit Court of Appeals in its opinion stated: (F.R. bottom p. 1692 top p. 1693)

> "One of the questions raised in connection with the matter of jurisdiction relates to the applicable law.
>
> "In so far as the right here involved is substantive it is controlled by the laws of Iowa and Wisconsin, in which states the property is situated. Section 10968 of the Code of Iowa of 1935 provides: 'A Trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is prosecuted.' In the case of Tucker v. Silver, 9 Iowa 261, the Supreme Court of Iowa. said:
>
> " 'The general rule, independent of the Code. is that a trustee is a necessary party;' And it was held that the provisions of the code do not change the rule. See also: *Bennett Savings Bank v. Smith* 171 Iowa 405, 408; *In re Receivership of Selway Steel Post & Fence Co.,* 198 Iowa 950, 957-8; *Fransham v. Tow Bros.,* 196 Iowa 1082, 196 N. W. 71. The Wisconsin rule is the same. *Haynes v. Lewis,* 21 Wis. 663; *Milwaukee Trust Co. v. Van Valkenburgh* (132 Wis. 638) 112 N. W. 1083."

In substance the contention of the petitioner is this: That in any action to foreclose a deed of trust securing a bond issue, if the defense is asserted that the deed of trust and bonds are without con-

sideration or were conceived in fraud and the alleged fraud or want of consideration is that of a corporate bondholder, that corporate bondholder immediately becomes an indispensable party to the action, and if its residence be the same as that of the defendant, federal jurisdiction is automatically ousted. (Petitioner's brief pp. 31-32)

Carried to its logical limit the argument means that if there be 10,000 bondholders, who are not conceded to be innocent purchasers for value, and the defense of fraud or want of consideration be raised, they must all be made parties, because the result of a finding of fraud or want of consideration in the deed of trust and bond issue would necessarily result in the invalidation of the bonds held by them. The mere fact that one bondholder, as in this case, may own 90 per cent, puts it in no more favorable position than that of the holder of one bond. One of the very purposes of making mortgages securing bonds to trustees is to avoid any such absurd situations. If the contention of petitioner were sound a trust deed securing a railroad bond issue could never, as a practical proposition, be foreclosed in the federal courts if anyone asserted the defense of fraud or want of consideration. Such trust deeds would then have to be foreclosed in every state in which any part of the railroad company's property was situated or collection of the bonds attempted in the various states in which the bondholders resided. Such theory is wholly in conflict with the decisions of this Court pertaining to actions of this character and amounts to a gentle suggestion that

the federal courts ought to denude themselves of all power to act in such matters.

(c) *The joining of petitioner did not oust jurisdiction.*

The joining of a party not indispensable whose citizenship is not diverse, does not oust the jurisdiction of the court. As stated by the trial court (F.R. 209-10, 19 Fed. Supp. 127, 141:

> "In a suit to foreclose a corporate mortgage in a federal court by such a trustee with jurisdiction resting solely upon diversity of citizenship, the joining of a party not indispensable whose presence destroys such diversity does not oust the jurisdiction of the court. Under former rules and practice the doctrine was laid down in Wormley v. Wormley 8 Wheat. 421 (451), that the joining of a nominal or formal party did not in cases resting on diversity of citizenship oust the jurisdiction of a federal court. In a comparatively recent case and since it has been customary to classify parties in suits in equity in federal courts as indispensable and proper parties, the Supreme Court speaking through Mr. Justice Butler, said:
>
> " 'District Courts have jurisdiction if all the parties on one side are of citizenship diverse to those on the other side. Jurisdiction cannot be defeated by joining formal or unnecessary parties. The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed *(Barney v. Latham* 103 U. S. 205, 215; Ex parte Nebraska, 209 U. S. 436, 444), and is not affected by the fact that one of the defendants is a citizen of the same state as the plaintiff, if the defendant is not an indispensable party to the controversy be-

tween plaintiff and defendant who are citizens of different states.' *Salem Trust Company v. Manufacturers' Finance Company,* et al., 264 U. S. 182 (189)

"I conceive the same rule to be applied in the following cases:

Blytheville, L. & A. S. R. Co. v. St. Louis-San Francisco Ry. Co., 33 F. (2d) 481 (C.C.A. 8);
Equitable Trust Co. v. Denney, 24 F. (2d) 169, (C.C.A. 7th Circuit);
Stewart v. Dunham, 115 U. S. 61;
Walden v. Skinner, 101 U. S. 577;
Korrison, Assignee v. Stewart, 93 U. S. 155;
McArthur v. Scott 113 U. S. 340, 396;
Rand v. Walker, 117 U. S. 340, 344;
McNutt v. Bland, 2 How. 9;
Bonnafee v. Williams 3 How. 574;
Wood, et al v. Davis, 18 How. 367;
Bacon v. Rives, 106 U. S. 99;
Maryland v. Baldwin 112 U. S. 490;
Wilson v. Oswego Township, 151 U. S. 56;
Construction Co. v. Cane Creek, 155 U. S. 283."

No exception was ever raised to the action of the trustees. The record shows that the trustees, at the request of the Phoenix Finance Corporation, promptly filed the original bill, they thereafter appeared by counsel selected by the Phoenix Finance Corporation, and diligently prosecuted the foreclosure suit at all times and stages. The provisions

of the trust deed above quoted expressly vest the trustees with sole power to foreclose in case of default, to effect sale, and to apply the proceeds and to procure a deficiency judgment.

The trustees were the only indispensable parties plaintiff. Phoenix Finance Corporation was fully represented in the litigation between the trustees. The joinder of it in the case did not oust the jurisdiction of the court, which was complete at the time petitioner was brought in.

The jurisdiction of the federal court depends on the state of things at the time the original action was brought, and after vesting it cannot be ousted by subsequent events. No change of the parties can affect that jurisdiction.

Mollan v. Torrance, 9 Wheat. 537;
Hardenberg v. Ray, 151 U. S. 112.

Thus where an action was brought in the State of Missouri by a citizen of Pennsylvania against a citizen of Missouri who was in possession of real estate, to recover such property, and the defendant being a tenant, on his motion the landlord a resident of Pennsylvania was made a co-defendant, the Court held that that did not interfere with the jurisdiction of the court already established, but was incidental to the jurisdiction acquired, and ancillary to it.

Phelps vs. Oakes, 117 U. S. 236;

See also:

Stewart v. Dunham, 115 U. S. 61-65;

Cella v. Brown (C.C.A. 8), 144 F. 742, cer. den. 202 U. S. 620;

Egyptian Novaculite Co. v. Stevenson (C.C.A. 8) 8 F. (2d) 576, 579;

Sioux City Terminal Ry. and Warehouse Co. v. Trust Co. of North America (C.C.A. 8), 82 F. 124, aff. 173 U. S. 99;

Wieland v. Pioneer Irrigation Co. (C.C.A. 8), 238 F. 519, aff. 259 U. S. 498.

In the case of *Supreme Tribe of Ben Hur vs. Cauble et al* 255 U. S. 356, 41 S. Ct. Rep. 338 this Court held:

> "(Quoting from syllabi) The jurisdiction of the United States District Court over a suit against a resident defendant, brought by non-resident members of a class for the benefit of all in the class, is not defeated by the representation by non-resident plaintiffs of members of the class who were citizens of the same state as defendant."

Also see:

Stewart vs. Dunham 115 U. S. 61, 5 S. Ct. 1163.

(d) *The District Court acquired complete jurisdiction when the receiver took possession.*

The court, when petitioner was brought in, not only had acquired jurisdiction between the original parties, but had appointed a receiver of all the bridge company's property, and the property was in the actual possession and custody of the court. This drew to it the right to decide all conflicting claims

to its ultimate possession and control and all persons claiming to be entitled to participate therein might come in or be brought in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings, even though such jurisdiction would have been lacking if such proceedings had been independently prosecuted.

Morgan's Co. v. Texas Central Ry., 137 U. S. 171, 201;
Krippendorf v. Hyde, 110 U. S. 276;
Palmer vs. Texas, 212 U. S. 118;
Central Union Trust Co. v. Anderson County Tex. 268 U. S. 93;
Marcell v. Engebretson (C.C.A. 8) 74 F. (2d) 93.

(e) *The cases cited by petitioner are not in point.*

The petitioner wholly disregards the doctrine of representation firmly established by the decisions of this court and none of the cases cited by it are similar in facts to the instant case.

The case of *Indianapolis vs. Chase National Bank* 62 S. Ct. 15, 86 L. ed. 27, Adv. Ops. Nos. 10-13, October Term 1941 is a case relating to the original alignment of parties acting in their own behalf and does not relate to the doctrine of representation.

It is not a case in which the Federal Court had full and complete jurisdiction of the subject matter and of the parties before the introduction of the party whose presence is now claimed to have disturbed the jurisdiction. The Indianapolis Gas Co. was not a party which was fully represented by

trustees before its entry into the case or one, the presence of which in the case was not necessary. It is not a case such as the original federal case here involved, where the trustees, indispensable parties, brought the suit and petitioner was a beneficiary whose joinder did not defeat jurisdiction. It is not a case such as the original case in the federal court in which even though Phoenix had not been made a party the Court could have proceeded to final judgment and decided every issue including the existence of indebtedness, nor is it a case in which the subject matter having been drawn into the Federal Court before Phoenix became a party the proceedings as to it were merely ancillary.

In the Indianapolis Case the former denial of the writ of certiorari was in the same case and the raising of the question of jurisdiction in the application for the second writ in the case was not an attempt to collaterally attack a decision in an independent suit which had been finally determined by the denial of a petition for a writ in which the question of jurisdiction now attempted to be raised was specifically presented. The Indianapolis Case was decided upon the circumstances of an extraordinary case while the situation here is a common one, the law as to which is well settled.

Finally, it is not a case in which the question of jurisdiction had been contested, tried out and specifically determined and a collateral attack on the jurisdiction attempted in another later suit where the first decree was pleaded in bar.

The cases cited by petitioner are all cases in which

(a) It appeared from the complaint or answer filed that there was a substantial and indispensable interest in the lawsuit owned and held by a party not a party to the record and that adjudication could not be made of the controversy presented without the presence of such party unrepresented in the pending litigation; or

(b) Cases in which the introduction of an indispensable party holding an interest in the lawsuit, wholly unrepresented, ousted the jurisdiction of the court.

Neither situation exists in the instant case.

Salem Trust Company vs. Manufacturers' Finance Co., et al., 264 U. S. 182.

(f) The Iowa decisional law is not as claimed by petitioner.

Petitioner cites a fraudulent conveyance case, Clemens v. Elder, et al., 9 Iowa 272, wherein Elder conveyed lands to James H. Grower and received a bond for the re-conveyance of the same upon the payment of $3,750.00 within one year as evidenced by two notes payable to J. H. Grower Bros. & Co., and an action was brought to set aside this deed as a fraudulent conveyance and it appears that James H. Grower in fact held the title for the firm to which the notes were payable, or their endorsers, or both, none of whom were made parties. The court

held the proper parties had not been made defendants. In that case there was no trust deed such as in the instant case authorizing the trustee to represent all parties interested. That case has no similarity in facts to the case at bar and obviously is not an authority for the proposition for which petitioner cites it.

Petitioner cites *Miller v. Mahaffy,* 45 Iowa 289, wherein plaintiffs claimed to be the owners of land by virtue of written contract with the Burlington & Missouri R. R. Co., that said contract of purchase was taken in the name of Robert Miller, and that he held the title as trustee for plaintiffs and not as owner, and that he fraudulently assigned the contract to defendant Mahaffy, who had knowledge thereof, and there was evidence tending to show that plaintiffs and Miller owned this land in common; that the sale to Mahaffy was not without consideration. Miller, although named as a party defendant, had not been served with notice of the action. The court held that under such circumstances there was a defect of parties, and that the court could not proceed at all until Miller was made a party. There was no instrument by virtue of which Mahaffy might act for Miller in the protection of his interests, and the case is not an authority for petitioner's contention as to representation.

Petitioner cites *Iowa Title & Loan Co. v. Clark Bros., et al* 213 Iowa 875, 237 N. W. 336. In that case there were a series of notes secured by the same mortgage and the court held that one or more

of the note owners might sue and recover at law and later enforce the mortgage lien, while the holders of other notes might in the first instance avail themselves of their remedy by foreclosure. The case does not hold that a person may have trustees proceed with the foreclosure of a mortgage or deed of trust to recover the claimed debt secured thereby, and having been defeated on the ground that there was no consideration and no debt existed, proceed to sue again on the same pretended indebtedness, nor does it hold that a person may sue on notes and having been defeated on the ground that there was no consideration, that he may then sue in the name of trustees for the foreclosure of a mortgage claimed to secure the same notes.

In *Iowa Title & Loan Co. v. Clark,* 215 Iowa 929, 247 N. W. 211, in which under a trust agreement giving to the trustee powers similar to but not as elaborately stated as the powers set forth in the trust deed in this case, the trustee brought on action to foreclosure a mortgage as to certain of the notes for which the mortgage was security, and an action at law to recover upon the remaining notes. The Iowa court specifically held that the owners of the notes having constituted the plaintiff their trustee to enforce collection of the debt represented by the notes, and the Iowa law (Section 10968, Codes 1927 and 1931) providing that a trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is prosecuted, the right to prosecute the action on the notes was in the trustee, and stated:

> "Under our statute the plaintiff, as such trustee of an express trust, had authority to bring action against the defendants in its own name without joining with it the beneficial owners of the notes. Aside from its duty as trustee to distribute the proceeds of the trust fund to those entitled thereto, the plaintiff was in no different position than if it were prosecuting this action as the absolute owner of the notes."

In the case of *McPherson v. Commercial Building & Securities Co.*, 206 Iowa 562, 218 N. W. 306, the question as to the powers of a trustee was passed upon. The court, in discussing the relationship between a trustee, occupying position similar to that of the trustees in this case, and the bondholders, said:

> "In the deed of trust set forth in the petition, the trustee was the pledgee of the securities, and was the proper representative of all the bondholders, with full power both under the trust deed and under the statute, Sections 12364-12371, Code 1924. Plaintiff's bond carried the written attestation of the trustee. *There was no lack of privity as between the holder of the bond and such trustee.*" (Emphasis supplied.)

Section 10968 of the Code of Iowa of 1921. 1935 and 1939 provides:

> "Plaintiff as legal representative. An executor or administrator, a guardian. a trustee of an expess trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with

him the party for whose benefit the action is prosecuted."

Also see *Hoskins vs. Hotel Randolph Co.* 206 Iowa 932, 211 N. W. 423.

Federal Land Bank of Omaha vs. Jefferson, 229 Iowa 1054, 295 N. W. 855, cited by petitioner is not in point. In that case the prayer of the petition asked only for judgment in rem and the party permitted the attachment to expire and jurisdiction to be lost thereby, while in the foreclosure suit the service was personal and deficiency judgment and other equitable relief were prayed.

II.

PETITIONER WAS FULLY REPRESENTED BY THE TRUSTEES IN THE FORECLOSURE CAUSE.

A number of cases have been cited under the preceeding point of this brief which also bear hereon and for brevity we do not repeat them, but confine ourselves to additional cases bearing on the subject.

In *Stoddard v. Thompson, et al.,* 31 Iowa 80, at p. 82, the court said:

"One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein."

In *Souffront v. La Compagnie Des Sucreries, etc*, 217 U. S. 495, 54 L. ed. 856, 30 S. Ct. 608, 612, this court said:

> "The persons for whose benefit, to the knowledge of the court and of all parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party as he would be if he had been a party to the record. *Lovejoy v. Murray 3 Wall. 1, 18 L. ed. 129.*"

See:

Anderson v. Watt, 138 U. S. 694, 704, 705.
Robbins v. Chicago City, 4 Wall. 657, 71 U. S. 657.
Lovejoy v. Murray, 3 Wall. 1, 70 U. S. 1, 19.
Fulsom vs. Quaker Oil & Gas Co. (8 CCA), 35 Fed. (2d) 84, 90.
Louisville & Nashville Ry. Co. v. A. L. Schmidt, 177 U. S. 230.
Schroeder v. State Bank, 144 Iowa 42.
Plumb v. Crane, Adm'r. etc., supra, 123 U. S. 560.

Petitioner asserts in its brief that the Supreme Court of Delaware was in obvious and demonstrable error in predicating its decision that petitioner was

represented in the foreclosure cause upon express authority appearing in the trust deed.

A very brief examination of the trust deed will demonstrate the incorrectness of this assertion. Section 10 Article IV of the trust deed (F.R. 41-42) specifically provides that in case of default by the company "the trustees in their own names or as trustees of an express trust shall be entitled to recover judgment for the whole amount so due and unpaid." It further provides that they shall be entitled to recover such judgment either before or after or during the pendency of any proceeding for the enforcement of the lien of the indenture upon the trust property and that their right to recover such judgment shall not be affected by any sale thereunder or by the exercise of any other right, power or remedy for the enforcement of the provisions of the indenture, or for the foreclosure of the lien thereof. It further provides that in case of a sale of the mortgaged property and of the application of the proceeds to the payment of the debt that they in heir own names as trustees of an express trust shall be entitled to enforce payment of and to receive the amount remaining due and unpaid upon any and all bonds issued thereunder and then outstanding for the benefit of the holders thereof and shall be entitled to recover judgment for any portion of the debt remaining unpaid with interest.

Section 13 of the same Article (F.R. 43-44) provides that no holder of any bond or coupon shall ave any right to institute any suit, action or pro-

ceeding in equity *or at law,* for the foreclosure of the indenture or for the execution of any trust thereof or for the appointment of a receiver *or for any other remedy* thereunder except in the case of refusal or unreasonable delay on the part of the trustees to act after notice.

The fact that the bondholders might under certain circumstances be permitted to act is wholly immaterial in view of the fact that they did not so act and that the trustees were given full authority to proceed not only to foreclose the mortgage but to recover the amount of indebtedness, if any due.

The decision of the Delaware Supreme Court was therefore exactly in accord with the terms of the trust indenture.

Petitioner cites *Mackay vs. Randolph Coal Company* 8 CCA, decided May 4, 1910), *178 Fed.* 881. That case involved a question of merger and was decided under the earlier equity rules, which were amended before the trial of the present case as set above set forth, and that case has been overruled and is not now an authority for the proposition for which it is cited, as has been later held by the court that rendered it.

In *Lane vs. Equitable Trust Company of New York* (Nov. 24, 1919, 8 CCA), 262 Fed. 918. cert. den. 252 U. S. 578, wherein the mortgage deed of trust, securing the bonds, contained the same provisions as those in the instant case, quoted above, the court held

that the complainant trustee was entitled to a deficiency judgment to pay the indebtedness secured by the deed of trust.

Equity Rule 10 as amended May 4, 1925, 28 U. S. C. A., following section 723, provides:

> "In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it pro rata among them according to their respective interests."

In the case of *Fidelity-Philadelphia T. Company v. Hale & Kilburn Corp.* (Sept. 16, 1937) 24 Fed. Supp. 3 at 11, after referring to the fact that Equity Rule 10 was amended on May 4, 1925 to read as above quoted, the court said:

> "It will be noted that the amendment of May 4, 1925, which is the rule now in force, besides expressly giving a trustee, who does not actually own the debt the right to recover a deficiency judgment, omitted the words, 'to the plaintiff'

from the clause 'any balance that may be found due to the plaintiff'. How important this omission is can be seen from the majority and dissenting opinions in *Lane v. Equitable Trust Co.*, 8 Cir., 262 F. 918, 922.

"It is beyond question that the amendment of 1925 to Rule 10 gives a trustee for bondholders under a corporate mortgage a standing in court as a party to recover a deficiency judgment in a foreclosure proceeding without regard to whether or not he is vested with the ownership of the debt, right to sue or chose in action. The rule does not change substantive rights. It does not affect what was said in *Continental-Equitable Title & Trust Co.*, supra, to the effect that actual ownership of the debt does not vest in the trustee until demand. It is procedural, and merely makes an agent a proper party to recover a judgment, not for himself as owner of the debt, but for his principals. The rights of the real owners of the debt are guarded by the last sentence of the rule. Moreover, prior to the Amendment of 1925, the question had been raised in *Mackay v. Randolph Coal Co.*, supra, whether the parties by agreement could give to a third party (the trustee) the right to sue to recover a debt without actual ownership of the debt. It seems more than likely that the Amendment of 1925 was promulgated to meet the difficulties which the extremely technical position adopted by the courts in the cases referred to had thrown in the way of corporate foreclosures for the benefit of bondholders. At any rate, those decisions, in view of the changed equity rule are no longer controlling. I therefore conclude that failure to make a demand does not bar the right of the trustee to deficiency decrees in this suit."

Also see:

Continental Equitable Title & Trust Co. vs. National Properties Co. 273 Fed. 967.
Central National Bank vs. Bateman & Companies, Inc., 15 Del. Ch. 31, 31 Atl. 202.
McPherson vs. Commercial Building and Securities Co. 206 Iowa 562, 218 N. W. 306.
Thomas vs. Brownsville Ry. Co. 109 U. S. 522.
Section 10, 968 Iowa Code 1935, quoted supra.
Rule 37 Federal Equity.
Rules of Procedure (28 U. S. C. A. following Sec. 73).
Hartford Ins. Co. vs. Southern Pacific Co., 227 U. S. 207, 47 S. Ct. 357 at 360.

Petitioner cites *In Re Eberling* (CCA 9) 123 Fed. (2) 520, which involved only the right to file claims in bankruptcy and bears no similarity to the case at bar.

Petitioner cites *In Re Eberling* (CCA 9) 123 Fed. (CCA 2) 143 Fed. 805, wherein the trustees under the trust indenture had no power to enforce any of the payments due, and as stated by the court "its powers as trustee were more limited than those of the ordinary trustee for bondholders upon a deed or mortgage." And the case did not involve any such trust indenture as involved in the instant case and the opinion was rendered prior to the amendment to Equity Rule 10 and it does not appear that in the jurisdiction where that case was tried there was a statute such as *Sec. 10968 Iowa Code 1935, quoted* supra.

Erratum: Page 85, line 21 should read: Petitioner cites National Salt Co. vs. Ingraham.

A reading of *Georgetown vs. Alexandria Canal Co.* 12 Pet. 91, 9 L. ed. 1012, will at once demonstrate its inapplicability to the circumstances of the case now being considered.

The petitioner at page 42 of its brief cites *Toucey vs. New York Life Ins. Co.,* (8 CCA) 102 Fed. (2) 16, but that case does not hold that both equitable and legal controversies presented may not be determined by a court of equity. On the contrary the court in the opinion at page 20 states:

> "Both of these claims were asserted and in controversy before it and the court of equity was called upon to decide upon both controversies. It did consider the evidence on both issues and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitabe controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding."

The same Court in the case of *First Trust & Savings Bank et al vs. Iowa-Wisconsin Bridge Company, et al* (8 CCA) 98 Fed. (2) 416, held that the consideration of the notes in controversy in the instant case were adjudicated in the foreclosure case. Instead of any such question being presented before the Federal Courts the claimed underlying considerations for petitioner's bonds were presented for adjudication and re-asserted before the Circuit Court of Appeals. By failing to raise

such question before the trial court it was waived, if it existed.

In *Deaton vs. Hollingshead* 225 Iowa 967, 282 N. W. 329 the Court said:

> "Code Section 12372 provides that a mortgage of real estate shall be foreclosed by equitable proceedings. Plaintiff in the foreclosure suit selected the equity forum for the adjudication of his rights and prayed not only for a money judgment, but also for foreclosure of the mortgage and appointment of a receiver. The court of equity had jurisdiction of the controversy and parties, and the action having been properly brought in equity, all issues, legal and equitable, are triable therein, and the court will determine the entire controversy." (Emphasis supplied)
>
> Also see *Armour & Company vs. Miller* (8 CCA) 91 Fed. (2) 521.

Thomas vs. Brownsville etc. R. Co. 109 U. S. 522.

is in point. In that case an action was filed for the foreclosure of a mortgage securing a bond issue. The bonds themselves were issued on account of a contract for the construction of the railroad. The court found as a fact that the bonds were invalid because the construction contract was fraudulent and therefore void. However, the court held that to the extent of the benefit conferred upon and received by the corporation in the construction of the road the bonds issued in payment thereof were not void, and that a decree for that amount should be allowed. This

case illustrates the point that in a suit to foreclose a mortgage or deed of trust securing a bond issue the court must inquire into the underlying considerations and determine whether a consideration exists, and this is what the Federal Courts did in the foreclosure suit.

See *Speers Sand and Clay Works, Inc. vs. American Clay Works* 20 Fed. (2) 333.

Petitioner at page 43 of its brief cites *Central Trust Company of New York vs. California & N. R. Co. 110* Fed. 70, and quotes from page 72 but omits stating what precedes and follows the quotation. That case involved the right of an individual bondholder to intervene in a suit by trustee to foreclose a mortgage securing bonds for the purpose of contesting the validity of certain bonds, where no answer had been filed by the defendant railroad company and the trustee was objectionable. The court held that the bondholder was entitled to intervene. No such exception was ever raised to the action or want of action of the trustees in the instant case. On the contrary, the record discloses that the trustees promptly at request of petitioner filed the original bill and thereafter appeared by counsel of petitioner's selection and prosecuted the suit at all times and stages diligently.

III.

THE FEDERAL COURTS HAD FULL AND COMPLETE JURISDICTION TO DETERMINE THE

MATTERS INVOLVED IN THIS CAUSE. THEY WERE FULLY WITHIN THE ISSUES AND WERE CONTROVERTED AND LITIGATED IN THE FEDERAL CAUSE.

(a) *As stated by the Supreme Court of Delaware the question of the consideration of the notes in suit as considerations for the bonds were fully within the issues in the foreclosure case.*

Reynolds, et al v. Stockton, 140 U. S. 254, cited by petitioner, bears no similarity to the instant case.

The case is similar to the class of cases where the plaintiff by his notice and pleadings asks for certain relief, and then on default or after answer, without further legal notice and without amendment, takes judgment based on different grounds than those alleged and for a wholly different amount in the absence of the defendant The court in the opinion states:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. * * * Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings."

(b) Courts are not limited to the pleadings and the decree in order to determine the issues of a former case and the effect of the adjudication thereof.

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 765, pp. 1618, 1620.

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 769, p. 1630 and Sec. 771, p. 1638.

34 Corpus Juris, Sec. 1329, p. 921.

State of Oklahoma v. State of Texas, 256 U. S. 70, 88, in which the court said:

"What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court."

Also see::

National, etc., Co. v. Oconto, 183 U. S. 216...

Sampson v. Jump, 188 Iowa 528, 175 N. W. 318.

Millie Mining Co. v. McKennie (6CCA), 172 Fed. 42.

Loeb v. Columbia Township Trustees, 179 U. S. 472, 481.

"Where the judgment or decree in a case has been reviewed on appeal or the decision or judgment of an appellate court is relied upon as res adjudicata the opinion of the court and the record in the case may be examined to determine what was adjudicated and whether the adjudication was on the merits. A bill of exceptions or statement for the purposes of appeal may be looked to."

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 772, p. 1642.

(c) *Doctrine of res judicata does not depend upon affirmance and denial of a particular proposition in the pleadings of the former suit, but on the fact that the proposition has been fully and finally investigated and tried.*

In *King City, Mo., for use and benefit of United States Cast Iron Pipe and Foundry Co. v. Southern Surety Company* (Sept. 29, 1931), 212 Iowa 1230, 238 N. W. 93, wherein the federal court had entered judgment denying material man recovery on contractor's bond, it was held *res judicata* of a suit by city for benefit of material man to recover on same bond and of legal issues as to effect of bond as well as equitable issues regarding reformation of bond. The court said:

> "This court is committed to the doctrine that *res adjudicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings of the former suit, but upon the fact that it has been fully and fairly investigated and tried therein. See *Reynolds v. Lyon County*, 121 Iowa 733, 96 N. W. 1096, 1099. We there said: 'The prevailing rule is so well expressed in Black on Judgments No. 614, that we quote with approval: "The doctrine of res judicata does not rest upon the fact that a particular proposition has been affirmed and denied in he pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now, these con-

ditions are fully met when any question, though foreign to the original issue, becomes the decisive question—the turning point—in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject - matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict of (or) finding, whether it was statedly and technically in issue or not." ' (Citing authority)

"Matters which follow by necessary and inevitable inference from the judgment-findings or determinations of the court, in relation to the subject-matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words. Sec. 34 C. J. 923.

"Applying the foregoing rules to the proposition confronting us, it seems quite clear that the plaintiff is estopped from maintaining the action now attempted to be litigated, by the former adjudication of the federal court."

(d) *The rule of the national courts and of the courts of Iowa as to what constitutes res judicata are the same.*

Petitioner cites *Baltimore Ship Co. v. Phillips*, 274 U. S. 316. In that case the court said:

"If upon the *same cause of action,* the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit *between the same parties or those in privity with them,* not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action the prior judgment or decree operates as an estoppel only as to matters actually in issue or *points controverted,* upon the determination of which the judgment or decree was rendered." (Emphasis supplied)

Also see:

Werlein v. New Orleans, 177 U. S. 390, 397, 20 S. Ct. 682, 44 L. ed. 816.
Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 378.
Davis v. Brown, 94 U. S. 423.

In *Bagley vs. Bates,* 223 Iowa 836, 273 N. W. 924, at 927, the court said:

"It is the general rule of law that 'a judgment on the merits rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to *every other matter which might with propriety have been litigated and determined in that action.* * * *

This is a well-established rule, of almost universal application, that a judgment, if rendered by a court of competent jurisdiction, on the merits, constitutes a complete bar and estoppel to a

subsequent action between the same identical parties based upon the same claim or demand or cause of action. *This is not only true with reference to matters in issue, but it is true as to all matters incident to or essentially connected with the subject of the action which might have been put in issue and adjudicated.* This rule is so familiar it needs no citation of authorities to sustain it." (Emphasized in opinion)

Also see *Rew v. School District*, 125 Iowa 28, 98 N. W. 802.

Petitioner on page 46 of its brief asserts that there was no pleading in the federal case which put in issue the validity or enforceability of the notes in suit. This assertion is without foundation. This assertion is without foundation. The bill in the Federal Court asserted that all of the bonds had been issued for good and valuable consideration and were outstanding in the hands of divers owners and holders for value and prayed that an account be taken of the amount due on the bonds and for deficiency judgment, appointment of receiver and general equitable relief. (F.R. 6, 10, 11, 12) The answer of the bridge company denied the

validity of the trust, alleged that there was a good defense to all or part of the bonds, prayed that plaintiff be required to make a complete showing as to consideration received by the bridge company in each and every instance for the bonds. (F.R. 62-68) The petition of intervention, which was ordered to be taken as an answer to the bill of complaint, alleged that the bonds and the mortgage were

fraudulent and without consideration, invalid and void, prayed that complainants' bill be dismissed * * and for general equitable relief. (F.R. 73-83) Phoenix' answer to petition of intervention disclaimed knowledge of matters alleged, asserted it owned and held for value a large amount of the bonds of the bridge company and offered to do equity. (F. R. 91-92)

On the one hand under the pleadings the complainants asked for an account of the pre-existing debt and its recovery and on the other hand the petition of intervention asked that the bill be dismissed. Clearly under such allegations there can be no question but what the issue was clearly drawn as to the existence of the pre-existing debt claimed in support of the bonds, for which the security of the mortgage was given.

Phoenix' president, John A. Thompson, on part of complainants, testified as to such claimed pre-existing debt and notes now in suit as consideration for the bonds. (F.R. 542, 562, 563, Ex. A-2 HEB 843, 844, Ex. 28 HEB 829, 986). Following the Master's Report the trustees filed exceptions to the Master's Report (F. R. Supp. 1-14) and adopted the exceptions to the Master's Report filed by petitioner, Phoenix. (F.R. Supp. 7) Petitioner, Phoenix' exception 6 again specifically put forward the notes involved here and their claimed underlying consideration as consideration for the bonds and specifically set forth the claimed underlying considerations of these notes as consid-

eration for the bonds (F. R. Supp. 48-49)

Under those issues and points controverted if the federal court had found a pre-existing debt or obligation on these notes in support of the bonds and rendered decree against the bridge company for the amount of such notes there could have been no question but what such decree would have been binding as res adjudicata on the bridge company. On the other hand when the court decreed as it did that the "bill of plaintiffs be dismissed as to plaintiff Phoenix Finance Corporation, and the prayer of the bill be denied," except insofar as it provided for other bondholders, that was an equally binding adjudication against the trustees and Phoenix as to any claimed indebtedness. (F.R. 204)

A judgment or decree of dismissal renders all the issues and points controverted in the case res adjudicata and constitutes a bar to any subsequent suit for the same cause of action.

Hickey vs. Johnson (8 CCA) 9 Fed. (2) 498, 501.

Petitioner Phoenix asserts that it was necessary that there be a pleading of counterclaim or set-off in the federal case. Such contention is without merit since that is only a collateral attack on the judgment and a matter which could only be claimed on direct appeal from such judgment on an assignment of error.

Root vs. Woolworth 150 U. S. 401, 414, 14 S. Ct. 136.

Thornton vs. Carter (8 CCA) 109 Fed. (2) 316, 320.

Cooper vs. Reynolds 10 Wall. 308, 316, 77 U. S. 308.

Manson vs. Duncanson 166 U. S. 533, 547, 17 S Ct. 647.

Petitioner Phoenix on first appeal to the Circuit Court of Appeals assigned as an error "that the decree is beyond the scope of the pleadings and parties and of the proper evidence under the pleadings," etc. (F.R. 526-527) That assignment of error was overruled by the Circuit Court of Appeals' affirmance of the case and such decision is res adjudicata. (F. R. y695, 1709, 98 Fed. (2) 416, 421) Petitioner having litigated the question of consideration and the court having jurisdiction of the subject matter and of the parties any claimed error in the decision could only be reviewed on appeal and unless modified on appeal the decision is final even if it were erroneous.

34 C. J. p. 901, Sec. 1311.

American Express Co. vs. Mullins 212 U. S. 311, 29 S. Ct. 381.

Roche vs. McDonald 275 U. S. 499, 48 S. Ct. 142.

In *57 C. J.* p. 389, Sec. 40:

"Although the matter could not be interposed as a set-off because no action could be main-

tained thereon it may still be available by way of defense."

In *49 C. J.* p. 310, Sec. 380:

"Where matter relied upon is strictly a defense in whole or in part to plaintiff's cause of action, it need not be set up as a cross demand."

A court of equity, or a court possessing equitable jurisdiction, has inherent power as a part of its general jurisdiction, to allow or compel a set-off independent of statute. 57 C. J. 361; *Scott v. Armstrong,* 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059. The right to set-off formerly regarded as attaching to the remedy only and not to the debt itself, is now recognized, particularly by the federal courts, as a matter of substantive justice affecting substantive relations between the parties. *The Gloria,* 286 Fed. 188, 192; Questions of C. C. A., answered 266 U. S. 328, 45 S. Ct. 112, 69 L. ed. 313.

In the federal courts set-off is not confined to matters arising out of the contract or transaction sued on. *Central Appalachian Co. v. Buchanan* (CCA 6th), 90 Fed. 454, (opinion by Judge Lurton,) concurred in by Judge Taft).

IV.

THE NOTES IN SUIT WERE DETERMINED IN THE FEDERAL CASE NOT TO CONSTITUTE A PRE-EXISTING DEBT SUPPORTING THE BONDS

FOR THE SECURITY OF WHICH THE MORTGAGE WAS GIVEN.

Petitioner Phoenix Finance Corporation took over as the successor in the fraudulent scheme all the assets of the Phoenix Finance System, Inc., with notice of all the plans of its predecessor adopting the results of its activities. (Court's Finding No. 41 F. R. 402) The record shows that bridge company bonds held by Phoenix Finance Corporation were by resolution of the board of directors of the bridge company while controlled by John A. Thompson, president of both Phoenix Finance System, Inc. and Phoenix Finance Corporation and his associates on March 7. 1932 directed to be delivered to the Phoenix Finance System, Inc. in payment of alleged obligations of the bridge company to the Phoenix Finance System, Inc. found to be fraudulent and without consideration by the court in the original trial. (Court's finding No. 40, F. R. 201-202, 979-982)

The same Thompson-Phoenix controlled directors of the bridge company mentioned in the Court's finding No. 40 by resolution on July 8, 1933 directed $21,100 additional bonds of the bridge company to be delivered to the Phoenix Finance Corporation as collateral security for the payment if obligations originating with the Phoenix Finance System, Inc. and to pay interest on fraudulent bonds and some other items found to be without consideration by the court on the original trial. (F.R. consideration by the court on the original trial. (F.R. 1027-1029, 203, 204, 1704-1705) The notes in suit are

included in these alleged obligations. The record shows that the Phoenix Finance Corporation took up the conspiracy where the Phoenix Finance System, Inc. left off. The bond issue and mortgage securi it were all the result of a single deliberate scheme to obtain possession of the bridge company's prop and to freeze out its stockholders, starting with the $50,000 mortgage and culminating with the foreclosure proceedings and participated in by both Phoenix Finance System, Inc. and its successor Phoenix Finance Corporation. (Court's opinion F. R. 157, 412-413, opinion C. C. A. F. R. 1708)

Where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme * * * It is not necessary that they be in pari delicto. It is enough that each was at some time and in some degree a party and an aider of the improper transaction.

Fletcher Cyc. of Corp. (Perm. Ed.) Vol 1, Sec. 198, pp. 650-655;

McCandless v. Furlaud 296 U. S. 140, 56 S. Ct. 41;

Irving Trust Co. v. Deutsch (CCA) 73 Fed (2) 121, 123;

Jackson v. Smith 254 U. S. 586, 41 S. Ct. 200, 65 L. ed. 418.

John A. Thompson, president of the Phoenix Finance Corporation, was also president of the bridge company, and he and other directors of Phoenix Finance Corporation, who were also directors of the bridge company, controlled and dominated the bridge company to the disadvantage of the bridge company, said John A. Thompson being of dominating influence and character. (F.R. 129-135; F.R. bottom p. 163 top p. 164; court's opinion F. R. 156-179; court's findings of fact F. R 179-202, especially F.R. 188.) And at the time of the alleged payments and the execution of the alleged notes and at the time of the delivery of the bonds, they were in duty bound merely to credit any payments claimed to have been made by Phoenix to or for the bridge company on the amount due the bridge company from Phoenix.

In *Geddes vs. Anaconda Copper Co.* 254 U. S. 590, 41 S. Ct. 209, the court said:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden upon those who would maintain them to show their entire fairness and where a sale is involved *the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character.* This court has been consistently emphatic in the application of this rule. which, it has declared, is founded in soundest morality, and we now add in the soundest business policy."

Such transactions are presumptively fraudulent.

Corsicana National Bank vs. Johnson, 251 U. S. 68, 40 S. Ct. 82.

Thompson and petitioner Phoenix, dominating and controlling the bridge company, owed a fiduciary duty to the bridge company, in the performance of which the law forbade them to take any notes and then bonds as collateral thereto for any payments claimed to have been made by Phoenix to the bridge company or for it while Phoenix was indebted to the bridge company in a far greater amount, and having acted in a dual capacity the notes and bonds were presumptively fraudulent.

In *Thompson on Corp.*, Vol. 3, Sec. 2289, it is said:

> "But the rule is also well settled that where, under proper pleadings, fraud or illegality in the issue or sale of such bonds or coupons has been shown, then the holder or indorsee, before he is entitled to recover, must prove that he is a holder for value; *and the mere possession of the paper* under such circumstances is *not sufficient.* The reason of this rule is that the proof that the instrument was unlawful or fraudulently issued overcomes the presumption of good faith on the part of the holder, and then casts upon him the burden of proving that he was a purchaser for value before maturity and without notice of any defense. * * * "

Petitioner Phoenix not only urged the notes in suit as consideration for the bonds, but also the claimed underlying considerations of such notes, as shown by

Phoenix' exception No. 6 adopted by the trustees (F. R. Supp. 48-49, 7). All the evidence bearing thereon was presented and analyzed in detail and from it the court found that there in fact was no consideration for the notes and bonds; that Phoenix in fact at the time of the amounts claimed as consideration therefor was indebted to the bridge company in a far greater amount; for $14,000 of stock of the bridge company received by Phoenix without consideration and for other items due the bridge company, and that in law any payments made by Phoenix were merely a partial payment on its indebtedness to the bridge company, and that no consideration existed for the notes involved in this action. (F.R. 156-204 and especially 177 and 204)

V.

SUCCESSFUL DEFENSE TO ACTION ON COLLATERAL BARS AN ACTION ON THE DEBT.

As is said in *Jones on Mortgafes,* 8th Ed., Sec. 316, at p. 289:

> "A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment.' Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie."

Also see *Carpenter v. Logan*, 16 Wall. 261, 21 L. Ed. 313.

The rule is stated as follows in 34 C. J. P. 853:

"A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

In support of this are cited among other cases, *Johnson v. Forstall, et al.*, 3 La. Ann. 466, and *Sykes v. Gerber*, 98 Penn. Stat. 179.

In the last cited case there had been a suit on a promissory note, with judgment for defendant. An action was then commenced on the original debt. The court assumes that the note had not been given in payment of the debt but as security. The opinion then states:

"The original claim and the note were by the same parties, for the same consideration and payment of either would have satisfied both. A judgment in favor of the creditor upon either would be a bar to a recovery on the other. And a judgment for the debtor in an action which finally disposed of the note for equally good reason is a complete defense against a suit upon the account or claim which the note represented."

The situation as to the purported notes involved in the Delaware action is exactly parallel. The $20,100 bonds were given as security for certain notes. There was and could be no consideration for them except the alleged indebtedness represented by the notes. When the court found that there was no con-

sideration for the bonds, it necessarily found that there was no valid indebtedness and therefore no consideration for the notes representing the purported indebtedness.

The rule stated as quoted above from Corpus Juris is fully sustained by this Court in *Chew v. Brumagen,* 13 Wall. 497, 20 L. ed. 663, in which the converse situation existed, i. e., the original action was on the indebtedness and the second action an attempt to foreclose the mortgage. This case is also valuable authority on the proposition that where a trustee of an express brings an action the cestui que trust is bound by that judgment not only in the state where the judgment was rendered, but in all other states.

In that case a bond for $3,500.00 was secured by a mortgage. The bond was assigned by the obligee to another, who brought suit on it in the State of New York. A defense of fraud was interposed. A verdict was returned for the plaintiff, but for only $2,091.25. Judgment was entered for this amount and paid by the maker of the bond. The bond and mortgage were then assigned to a third party who attempted to foreclose the mortgage in the State of New Jersey. The mortgagor set up in defense the previous suit on the bond in New York, the judgment and the payment of the judgment, claiming that the debt, which the mortgage was given to secure w thereby satisfied, and consequently that the mortgage was satisfied. His plea of res adjudicata was

rejected by the courts of New Jersey and an appeal taken to this court.

With reference to the right of the trustee to sue, he being the only indispensable party, and as to a judgment in an action by him being binding upon his cestui que trust, the court cited the statute of the State of New York, which is practically identical to Code of Iowa 1935, Section 10968, supra, and held that neither the cestui que trust nor his personal representative was a necessary party to the suit brought upon the bond by the trustee. The court said:

> "They were represented by the trustee, and the judgment which he recovered settled finally against them, and claiming under them, as well as against Wood (the trustee) the amount recoverable."

The court further held that the judgment in the original suit determined finally the amount of the debt for which the bond was given and neither the cestui que trust nor his administratrix nor any subsequent assignee of either of them could maintain that the bond was not wholly extinguished in the judgment.

Also see:

Kenyon v. Wilson, The Same v. Baker, 78 Iowa 408

U. S. v. California & Oregon Land Co., 192 U. S. 355, 24 S. Ct. 266;

Beloit v. Morgan, 7 Wall. 619, 19 L. ed. 205.

Thompson v. Roperts Bros., 65 U. S. 14, 16 L. Ed. 648.
Schroeder v. Bank, 144 Iowa 42.

The fact that a party to a judgment is merely a "proper" and not a "necessary" party does not relieve him from the conclusive effect of the adjudication.

Freeman on Judgments (5th Ed.) Vol. 1, Sec. 430, p. 936.

One, though not a party, is bound by the judgment in a suit prosecuted at his instance and on his behalf and for his benefit.

Freeman on Judgments (5th Ed.) Vol. 1, sec. 430, p. 638.
Souffrant v. LaCompagnie & Des Sourcreries, 217 U. S. 475.
Stoddard vs. Thompson 31 Iowa 80, 82.

In *Plumb vs. Crane, Adm'r. etc.* 123 U. S. 560, where one holding the title to certain lands in trust was made a party to a suit concerning the title to properly pleaded as res adjudicata in an action beployed counsel and filed answer in the name of the trustee it was held that the decision in that case was tween the same plaintiff and the cestui on the same properly leaded as res adjudicata in an action besubject matter.

CONCLUSION.

The record shows that this case has been carefully considered by the Supreme Court of Delaware and that that court's decision is in harmony with the previous decisions of this Court. The questions presented by the petition have been determined by this court in its prior decisions and the petition presents no new question of general imortance.

We respectfully submit that the petition for writ of certiorari should be denied.

DANIEL F. WOLCOTT
FRED A. ONTJES
WM. C. GREEN
Counsel for Respondent,

Southerland, Berl & Potter
Geo. Gray Thouron
Of Counsel